(14)

No. 94-203-ATX
Status: GRANTED

Title: Fortis Morse, Kenneth Curtis Bartholomew and Kimberly J. Enderson, Appellants
v.
Republican Party of Virginia, et al.

Docketed:
August 1, 1994

Court: United States District Court for the Western District of Virginia

Counsel for appellant: Karlan,Pamela S.

Counsel for appellee: Getchell Jr.,E. Duncan, Carrell,Daniel A., Brame,J. Robert, Solicitor General

Notice of appeal filed 060894

Entry	Date	Note	Proceedings and Orders
1	Aug 1 1994	G	Statement as to jurisdiction filed.
2	Aug 31 1994		DISTRIBUTED. September 26, 1994 (Page 132)
3	Aug 31 1994	X	Motion of appellees Republican Party of Virginia, et al. to dismiss or affirm filed.
7	Sep 16 1994	X	Brief of appellants in opposition to appellees' motion to dismiss or affirm filed.
6	Sep 20 1994		Record requested -- WHR.
8	Oct 24 1994		Record filed.
		*	Original and certified proceedings from the USDC/Western District of Virginia. (1 Folder)
9	Oct 26 1994		REDISTRIBUTED. November 10, 1994 (Page 1)
10	Nov 14 1994	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
11	Jan 4 1995		REDISTRIBUTED. January 20, 1995 (Page 1)
12	Jan 4 1995		Brief amicus curiae of United States filed.
13	Jan 13 1995	X	Brief of appellees in response to brief of the United States as amicus curiae filed.
14	Jan 13 1995		LODGING consisting of a letter submitted by counsel for the appellees.
15	Jan 23 1995		PROBABLE JURISDICTION NOTED.
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16	Mar 9 1995		Brief of appellants Fortis Morse, et al. filed.
17	Mar 9 1995		Joint appendix filed.
18	Mar 9 1995		Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
19	Mar 9 1995		Brief amicus curiae of National Association for the Advancement of Colored People filed.
20	Mar 9 1995		Brief amicus curiae of United States filed.
21	Mar 27 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Apr 3 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. ent filed.
23	Apr 10 1995		Brief amicus curiae of Commonwealth of Virginia filed.
24	Apr 10 1995		Brief of appellees Republican Party of Virginia, et al. filed.
25	Apr 12 1995		LODGING consisting of ten copies of an unpublished case,

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No. 94-203-ATX

Entry	Date	Note	Proceedings and Orders
			Jefferson v Quarles, No.87-0356-R (E.D. VA., May 27, 1987) submitted by counsel for the respondents.
26	May 4 1995		Reply brief of appellants filed.
27	Aug 1 1995		SET FOR ARGUMENT MONDAY, OCTOBER 2, 1995. (1ST CASE).
28	Aug 4 1995		CIRCULATED.
29	Sep 18 1995		LODGING consisting of ten copies of each of the preclearance decisions submitted by the Solicitor General
30	Oct 2 1995		ARGUED.
31	Oct 4 1995		Letter from the Solicitor General and nineteen submissions received and distributed.

No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

OLIVER NORTH FOR U.S. SENATE COMMITTEE, INC. REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party's decision to hold a convention and to impose a non-waivable $45 fee on all voters who wish to participate in the process of nominating that party's candidate for United States Senator?

2. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party's decision to hold a convention and to impose a non-waivable $45 filing fee on all candidates for the position of delegate to a state convention called to nominate that party's candidate for United States Senator?

3. Can individual voters who have been forced to pay an illegal poll tax or who claim to have been deterred from participating in an election by the existence of such a tax bring suit under section 10 of the Voting Rights Act, which explicitly outlaws poll taxes?

PARTIES

The following were parties in the courts below:

Fortis Morse;

Kenneth Curtis Bartholomew; and

Kimberly J. Enderson

Plaintiffs;

The Oliver North for U.S. Senate Committee, Inc.;

The Republican Party of Virginia; and

The Albemarle County (Virginia) Republican Committee

Defendants.

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No. 94-____

IN THE

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Appellees.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and order of the three-judge district court are contained in the Appendix to this Jurisdictional Statement [hereafter "J.S. App."], at pages A-2 to A-13; the district court's opinion is reported only on Lexis, 1994 U.S. Dist. LEXIS 7112.

JURISDICTION

The district court entered judgment against appellants on May 18, 1994. J.S. App. at A-13. The Notice of Appeal was filed on June 8, 1994. J.S. App. at A-19. This Court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

This case involves section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c, which is reprinted in the Appendix at pages A-15 to A-17, and section 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, which is reprinted in the Appendix at pages A-17 to A-18.

STATEMENT OF THE CASE

Since 1964, the Republican Party of Virginia ("RPV" or "the Party") has used a variety of methods for nominating its candidates for U.S. Senator.[1] In 1964 and 1978, for example, the Party's State Central Committee chose the nominee, while in several other years, the nominee was chosen by a statewide convention. In 1990, the RPV decided to choose its nominee by primary, but the primary was canceled when no challenger opposed the renomination of the Republican incumbent.

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[1] This case is before the Court following the district court's dismissal for failure to state a claim. Accordingly, the facts are taken from appellants' complaint and various affidavits and statements made by appellees.

In December 1993, the Central Committee decided to switch back to selecting the party's nominee through a convention. Accordingly, it issued a call for a convention to occur in June 1994, pursuant to state law governing the timing of political party nominating conventions. *See* Va. Code § 24.2-510(1). All registered voters who were in accord with the Party's principles and who were willing if requested to declare their intent to support the Party's eventual nominee were entitled to participate in local mass meetings.[2] But any voter who wished to participate at the state level, where the actual nominating decision was made, was required to file as a "delegate" and pay a non-waivable $35 or $45 registration fee.

Under the RPV's own rules, delegates were to be "elected" at the mass meetings to attend the convention. In fact, however, as a matter of longstanding party practice,[3] *any* voter who pledged to support the Party's nominee and paid the fee was certified as a delegate and, when he or she reached the convention, was free to vote for the candidate of his or her choice.[4] Over 14,600 voters were certified as "delegates" eligible to attend the convention and vote their preferences. In effect, the state convention operated, as it had in the past, as a "great indoor primary," Frank B.

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[2] Virginia does not have party registration.

[3] *See* Transcript of Oral Argument at 30 (May 18, 1994) (noting that while the party's rules provide for the selection of delegate slates and for the "instruct[ion of] delegations" on how to vote, "the campaigns, as a matter of tactics to maintain Party unity, haven't been doing it").

[4] The weight attached to an individual's vote is governed by a formula that takes into account the level of support for Republican presidential and gubernatorial candidates in the voter's city or county. Appellants have not challenged any of the Party's internal rules regarding how voting at conventions is to be conducted.

Atkinson, The Dynamic Dominion: Realignment and the Rise of Virginia's Republican Party Since 1945, at 343 (George Mason Univ. Press 1992).

Appellants Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly Enderson are registered voters in Virginia. Morse and Enderson have long been active in Republican politics; Bartholomew is an independent. All three wanted to participate in selecting the Party's 1994 senatorial nominee.

Both Bartholomew and Enderson, however, were deterred from attending the convention by the $45 fee. Thus, they were completely excluded from participating in the Party's actual nominating process.

On February 28, 1994, Morse sought, from the Albemarle County Republican Committee (which under party rules was responsible for collecting the fee and certifying "delegates"), a waiver of the fee on the grounds of economic hardship. A Committee official told Morse that the fee was mandatory but informed him that one of the candidates was paying the fees of voters who supported him. Ultimately, the Albemarle County Coordinator of the Oliver North for U.S. Senate Committee gave Morse $45 to reimburse him for the fee, indicating that if Morse did not attend the convention "we'll hunt you down." Morse subsequently repaid the $45 to the North Committee and attended the convention, where he supported North's rival, James Miller.

Following investigation of the pervasiveness of the reimbursement scheme, and a month before the convention, appellants filed this lawsuit in the United States District

Court for the Western District of Virginia.[5] They alleged that the filing fee constituted a "standard, practice, or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act; because the Party had never received preclearance for the fee, or its decision to raise the fee over time, its imposition violated section 5. They also alleged that the Party's imposition of a filing fee violated section 10 of the Voting Rights Act, which prohibits the use of poll taxes. In addition to these statutory claims against the Party, appellants raised constitutional challenges to the fee under the Equal Protection Clause of the Fourteenth Amendment and the Twenty-Fourth Amendment. Finally, they alleged that the North campaign's practice of paying or offering to pay the fee for voters who indicated a commitment to support Oliver North violated section 11 of the Voting Rights Act of 1965 as amended. They invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343 and under 42 U.S.C. §§ 1973h(c) and 1973j(f).

Appellants did *not* seek to halt, delay, or disrupt the convention. Rather they sought only an injunction permitting all individuals who were otherwise qualified -- because they were registered voters prepared to pledge their support to the ultimate Republican nominee -- to attend the convention. In addition, they sought declaratory relief and a permanent injunction against requiring a registration fee unless federal preclearance was first obtained.

A three-judge district court was convened to hear

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[5] The district court stated that the appellants delayed over five months in filing this action. J.S. App. at A-5. This statement presupposes that appellants should have filed suit as soon as the call for the convention was issued in December 1993. This would have required them to act without first attempting to register or to seek a waiver, as appellant Morse did, and without any investigation of the factual or legal bases of their claims. *See* Fed. R. Civ. P. 11.

appellants' section 5 and section 10 claims. After an expedited briefing process, that court held oral argument on May 18, and on the same day, issued its opinion. It remanded appellants' constitutional and section 11 claims to the single-judge district court[6] and dismissed appellants' claims under sections 5 and 10.

With regard to appellants' section 5 claim, the district court recognized that section 5 extends to political parties. But it thought that section 5's reach was limited to a party's conduct of a primary election. Neither a party's practices relating to a nominating convention nor the process of selecting delegates to such a convention through mass meetings or party canvasses was subject to section 5 review. *See* J.S. App. at A-8 to A-11. According to the district court, this result was compelled by this Court's summary affirmance in *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972).

With regard to appellants' section 10 claim, the district court held that the Act did not authorize suits by private citizens.[7] It concluded that only the Attorney General is authorized to bring suit against illegal poll taxes. J.S. App. at A-11 to A-12. Individual voters who have been forced to

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[6] Appellants do not challenge the three-judge court's decision to remand the constitutional and section 11 claims. Simultaneously with their filing of the Notice of Appeal in this proceeding, appellants voluntarily dismissed their section 11 claim against the Oliver North for U.S. Senate Committee, since the convention had already occurred and they had sought only declaratory and injunctive relief against this defendant. Appellants also moved to postpone consideration of their constitutional claims against the RPV and the Albemarle County Republican Committee pending this Court's resolution of the statutory issues presented by this appeal.

[7] This was not an argument raised by defendants and the district court never asked appellants to address this question.

pay such a tax, or who have been deterred from voting because of it, the district court declared, have no cause of action under section 10.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

This case raises important questions about the scope of section 5's preclearance requirement. With one exception, whose scope was misinterpreted by the court below, every other court to have reached the question has required political parties to preclear changes in rules relating to their nomination of candidates for public office. The decision of the court below completely ignored contrary authority and misinterpreted the regulations promulgated by the Attorney General, who has consistently required preclearance and has interposed objections preventing party rules from taking effect. The decision in this case undermines section 5's "self-monitoring" regime, which requires covered entities to identify and submit changes in their election law. *Clark v. Roemer*, 111 S.Ct. 2096, 2104 (1991). And it leaves political parties, individual citizens, and lower courts uncertain as to when political parties must seek preclearance. Accordingly this Court should either summarily reverse the judgment of the court below or should note probable jurisdiction. To let stand the lower court's judgment in this case would only magnify these uncertainties many times over and prompt further litigation.

This case also raises important questions about judicial enforcement of the Voting Rights Act, which has relied largely on lawsuits brought by private individuals. This Court, the lower courts, and Congress have repeatedly reaffirmed private rights of action under the Act, despite the absence of explicit authorization. This lawsuit marks the

first time that any federal court has held that a citizen whose right to vote was denied or abridged cannot bring suit.

I. THE DECISION OF THE COURT BELOW REPRESENTS SO EXTREME A DEPARTURE FROM WELL-SETTLED PRINCIPLES ABOUT THE SCOPE OF SECTION 5 THAT IT MUST BE REVERSED

A. *Section 5 clearly covers the activities of political parties.*

Section 5 of the Voting Rights Act requires that, before "the election law of a covered State [is altered] in even a minor way," the State or the entity responsible for the change must obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia. *Dougherty County Board of Education v. White*, 439 U.S. 32, 37 (1978). This Court has repeatedly held that section 5 of the Voting Rights Act should be given the "broadest possible scope." *Id.* at 38; *Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969).

That section 5 reaches the activities of political parties within covered jurisdictions has been well-established law for over twenty years. *See, e.g., MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court); *Wilson v. North Carolina State Board of Elections*, 317 F. Supp. 1299 (M.D.N.C. 1970) (three-judge court). The express language of the Voting Rights Act supports this universal interpretation. Section 2, for example, provides that the Act is violated when "the political processes leading to nomination or election" are not equally open to all voters.

42 U.S.C. § 1973(b).[8] Similarly, section 14(c)(1) defines voting to include "all action necessary to make a vote effective in any primary, special, or general election ... with respect to candidates for public or party office." 42 U.S.C. § 1973*l* (c)(1). Congress clearly intended that the Voting Rights Act would reach state party conventions as the legislative history of section 14(c)(1) expressly states: "an election of delegates to a State party convention would be covered by the act." H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464.

The Attorney General, whose long-standing administrative interpretation of section 5 is entitled to "considerable deference," *see, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178-79 (1985); *Dougherty County*, 439 U.S. at 39; *United States v. Sheffield County Board of Commissioners*, 435 U.S. 110, 131 (1978), has consistently construed section 5 to reach political party rules relating to the candidate nomination process. 28 C.F.R. § 51.7. Accordingly, he has repeatedly interposed objections to party rules when he has been unable to conclude

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[8] Sections 2 and 5 are to be construed in tandem, and this Court has consistently construed section 5 to be at least as broad as section 2. *See* Chisom v. Roemer, 111 S.Ct. 2354, 2367 (1991); H.R. Rep. No. 97-227, p. 28 (1982). The recent decision in Holder v. Hall, 62 U.S.L.W. 4728 (1994), is not to the contrary. First, there was no opinion for the Court. Second, the clear import of Justice Kennedy's and Justice O'Connor's opinions is that section 5 is, if anything, *broader* in its scope than section 2. *See Holder*, 62 U.S.L.W. at 4731 (Kennedy, J.) (suggesting that the requirement of preclearance under section 5 does not necessarily mean a practice is also vulnerable to attack under section 2); *id.* at 4732 (O'Connor, J., concurring in part and concurring in the judgment) (stating that whether a section 2 dilution claim may be brought raises "more difficult questions" than whether a practice marks a change with respect to voting under section 5); *cf. id.* at 4750 (Blackmun, J., dissenting) (stating that the scope of section 2 and section 5 are identical).

that the rules had neither a discriminatory purpose nor a discriminatory effect. *See* Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess. 2264, 2271 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General in charge of the Civil Rights Division, reporting on section 5 objections interposed to changes with regard to primary elections and conventions) [hereafter "Turner Appendix"].

B. *The district court completely misread the administrative regulation on which it claimed to rely.*

The district court thought that section 51.7 applied *solely* to the conduct of formal primary elections. J.S. App. at A-10. But the regulation imposes no such limit. "Changes with respect to the conduct of primary elections" are only one *example* of the sort of change which requires preclearance. The regulation clearly defines the covered changes as those that (a) "relate to a public electoral function of the party ... (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5." 28 C.F.R. § 51.7. Had the Attorney General intended to limit preclearance to primaries, he would have said so, rather than using them as an example of a covered change. .

In this case, both of the conditions set out in the regulation are clearly satisfied. First, the RPV was patently performing a public electoral function. It was engaged in the process of nominating a candidate for the United States Senate, and, as a political party within the definition of Virginia law, thereby automatically providing to that candidate a place on the general election ballot. *See* Va.

Code § 24.2-511 (providing for the certification, and placement on the general election ballot, of party nominees). Second, that activity was explicitly authorized by the Commonwealth of Virginia, a covered jurisdiction. *See* Va. Code § 24.2-509(A) (authorizing parties to choose their method for nominating Senatorial candidates); § 24.2-510(1) (setting the schedule for nominations made by methods other than primaries).

The regulation's examples of changes that lie outside section 5's scope further illustrate the flaw in the district court's reasoning. Each of them -- "the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms" 28 C.F.R. § 51.7 -- involves a party's constitutionally protected decisions about its substantive message. By contrast, the practice challenged in this case -- the imposition of a fee on otherwise qualified members of the Republican Party -- has no ideological content whatsoever.[9] In short, to the extent that the district court's holding relied on the Attorney General's regulation, the court was entirely mistaken.

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[9] The Call for the Convention expressly provides that "[a]ll legal and qualified voters under the laws of the Commonwealth of Virginia, regardless of race, religion, national origin,or sex, who are in accord with the principles of the Republican Party of Virginia and who, if requested, express in open meeting, either orally or in writing as may be required, their intent to support all of its nominees for public office in the ensuing election, may participate as members of the Republican Party of Virginia in its Mass Meetings, Party Canvasses, Conventions or Primaries encompassing their respective Election Districts."

C. *The district court's reliance on* Williams v. Democratic Party *was entirely misplaced*

The district court's reliance on *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. April 6, 1972), *summarily aff'd*, 409 U.S. 809 (1972), was equally flawed.[10] *Williams* concerned the rules for electing delegates to the Democratic National Convention. The party rule at issue provided that delegates would be elected at open conventions in each of Georgia congressional districts at which "any resident ... who subscribed to the principles of the Democratic Party" could participate. Slip op. at 2.

The district court in *Williams* was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard." Slip op. at 4. It quoted Congress' statement, in the legislative history of the 1965 Act that "*an election of delegates to a State party convention would be covered by the Act.*" Slip op. at 4 (emphasis in original) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464). But the *Williams* court reluctantly concluded, in "the absence of any procedure for submitting changes in party rules under Section 5," that section 5 preclearance could not be required since "[t]he State Party cannot force the State to seek approval for the party's rules and regulations." Slip op. at 5. It was "under *these* circumstances" that *Williams* concluded that section 5 did not

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10 The district court's decision in *Williams* is unpublished. Because this Court granted the appellants' motion to dispense with printing the jurisdictional statement, *see* 409 U.S. 809 (1972), the decision is unavailable in the Briefs and Records Room of the Court's Library or from the Library of Congress. Accordingly, appellants have lodged a copy of the decision with the Clerk's office.

apply. Slip op. at 6 (emphasis added).

Thus, *Williams* provides no warrant for the decision of the court below that conventions are exempted from section 5. The court in *Williams* recognized that Congress intended to reach state party conventions but thought that the absence of a mechanism for state parties to seek preclearance frustrated Congress' intent. Since *Williams* was decided, however, the Attorney General has promulgated regulations under 28 C.F.R. § 51.7 that provide a "way for the State Party to gain the required federal approval." *Williams*, slip op. at 5. Thus, the sole rationale for *Williams*'s holding no longer exists. In light of these changed circumstances and the fact that *Williams* did not involve the election of delegates to a state convention within a covered jurisdiction, this Court's summary affirmance of *Williams* does not support the decision of the court below in this case. The limited and uncertain scope of this Court's unexplained order has no precedential effect in to the present case. *See Anderson v. Celebrezze*, 460 U.S. 780, 785 n. 5 (1983); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

That *Williams* simply does not support the district court's analysis in this case is further confirmed by the fact that other three-judge courts have consistently held that section 5 covers political parties and extends beyond primary elections. *Fortune v. Kings County Democratic County Committee*, 598 F. Supp. 761 (E.D.N.Y. 1984) (three-judge court), for example, required preclearance of a county executive committee rule permitting committee members *who had been appointed* to participate in decisions to fill vacancies in nominations for public office (when, for example, a candidate died after being nominated) and in decisions to permit nonparty members to run as Democrats. The *Fortune* court found preclearance required because the change affected a "public electoral function," *id.* at 765,

namely, who would appear on the general election ballot. Similarly, *Hawthorne v. Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990) (three-judge court), required preclearance of internal Democratic Party rules eliminating the right of certain organizations *to appoint* members of state and county party committees and limiting the members who could be *selected* by other committee members. Finally, *Wilson v. North Carolina State Board of Elections*, 317 F. Supp. 1299 (M.D.N.C. 1970) (three-judge court), required preclearance of a party's decision, authorized by state law, to rotate nomination for state legislative seats among the various counties making up the legislative districts.

In short, neither the case law nor the administrative regulations support the district court's cramped interpretation of section 5.

D. *The district court's categorical exemption of party rules dealing with conventions conflicts with this Court's decision in* Allen v. State Board of Elections *that the decision to abandon election in favor of another method of filling an office requires preclearance.*

The district court held that "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting" is exempt from section 5. J.S. App. at A-8. The implications of that holding demonstrate why it simply cannot be the law.

In 1990, the Party decided to conduct a primary to determine its nominee for United States Senator. Under Virginia law, that primary would have been open to all voters. *See* Va. Code § 24.2-530. No voter would have

been required to pay a fee to participate. Nor would a voter have had to travel to, or incur the expenses of, a weekend-long convention in order to have his or her say in the choice of nominee.[11] In 1994, by contrast, the Party abolished the ability of individuals to vote in a primary election to fill the position of Republican nominee for United States Senator. Both *Allen v. State Board of Elections* and *Presley v. Etowah County Commission* clearly hold that a decision to abandon elections and to fill a position by other means is covered by section 5. *See Allen*, 393 U.S. at 569-70; *Presley*, 112 S.Ct. 820, 828-29 (1992); *see also* 28 C.F.R. § 51.13(i). The district court's decision here conflicts directly with that of the three-judge court in *Valteau v. Edwards*, No. 84-1293 (E.D. La. Mar. 21, 1984) (three-judge court), *stay denied*, 466 U.S. 909 (1984), which held that Louisiana could not switch from a primary to a caucus system for selecting its delegates to national political conventions in light of an objection by the Attorney General. Indeed, the district court's decision provides a powerful incentive for parties to abandon primaries, since it offers the hope that they can avoid section 5 by doing so.

Particularly under the circumstances of this case, where the party not only abandoned the primary, thereby eliminating the right to vote in the primary, but replaced it with a process that imposed an explicit financial burden on voters who wish to participate in the nomination process, the potential for discrimination is clear. Indeed, the district court's decision in this case would permit even more blatant discrimination. Under its rationale, a party could require delegates to its convention to have college degrees even if that would effectively bar members of minority groups from

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[11] Ultimately, no primary was held because no challenger filed to oppose incumbent Republican Senator John Warner. *See* Va. Code § 24.2-526.

attending. Similarly, a party could restrict attendance at mass meetings to individuals who own their own homes, even though this might discriminate against minority group members in areas where they are more likely to live in apartments. Even facially discriminatory measures -- like requiring Hispanics to pay higher filing fees than whites, or barring blacks from party canvasses altogether -- would be exempt from the preclearance process. Such a result would flout Congress' justifiable determination, in jurisdictions such as Virginia, "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). This shift in advantage is all the more appropriate in cases such as this because Virginia has a history of restrictive voting practices involving economic restrictions on the franchise. *See, e.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Harman v. Forssenius*, 380 U.S. 528 (1965). Requiring the victims to bring suit to stop such clearly discriminatory practices would undermine the central purpose of section 5. The district court's decision aggravates precisely the problems Congress tried to solve.

II. SECTION 5 REQUIRES PRECLEARANCE OF THE RPV'S DECISION TO IMPOSE A $45 FEE EITHER BECAUSE THE FEE INVOLVES A CANDIDATE QUALIFICATION FOR THE POSITION OF DELEGATE OR BECAUSE THE FEE REPRESENTS A PREREQUISITE TO VOTING AT THE CONVENTION.

In *Dougherty County Board of Education v. White*, 439 U.S. 32, 41-43 (1978), this Court squarely held that section 5 covers changes in the qualifications required for candidates for public office. *See also Presley v. Etowah County Commission*, 112 S.Ct. at 827. In particular, a decision to

impose, or raise, filing fees is a change requiring preclearance. *See Dougherty County*, 439 U.S. at 40-41; *see also* H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 18 (1981) (identifying filing fees as a part of the electoral process covered by § 5); Turner Appendix at 2252, 2253, 2256 (reporting Department of Justice objections under § 5 to filing fees). *Cf. Bullock v. Carter*, 405 U.S. 134, 144 (1972) (filing fees can restrict the field of candidates and thus "ten[d] to deny some voters the opportunity to vote for a candidate of their choosing").

The district court thought that the filing fees imposed by the RPV did not require preclearance because local party members "selec[t] delegates to the state nominating convention, not through an election, but through local conventions, mass, meetings, and party canvasses." J.S. App. at A-8 to A-9. As a factual matter, the district court was simply wrong. First, the Party's Plan of Organization -- its governing document[12] -- defines a "party canvass" as a "method of *electing* ... delegates to conventions," RPV Party Plan, Art. II, ¶ 22 (emphasis added); *see also* Art. VIII, § H,¶ 4 (authorizing "the Mass Meeting, Party Canvass, *or* [local] Convention *electing* the delegates" to a state convention to instruct its delegation on specific issues) (emphasis added). As the party's executive director explained, "[p]articipants at mass meeting *elect* ... delegates

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[12] *See* Affidavit of David S. Johnson (Executive Director of the RPV), ¶ 1 and Appendix A. Because this case was litigated on an expedited basis and disposed of on a motion to dismiss, the record is rather sparse. Moreover, although the district court acknowledged that it was required to take the facts in the light most favorable to the appellants, *see* J.S. App. at A-3, it nonetheless made several unfavorable factual findings about the nature of the RPV's nominating process. For example, appellants alleged in their complaint that delegates are "elected" in county meeting, *see* Complaint ¶ 13, but the district court nonetheless concluded they were not. *See* J.S. App. at A-10 to A-11.

to state ... conventions," canvasses or local conventions being simply alternatives to perform the "same" function. Affidavit of David S. Johnson (Executive Director of the RPV), ¶ 5. If delegates to a state convention are chosen by a process in which individual voters meet together to decide who should attend, that process involves voting within the meaning of the Voting Rights Act. This Court long ago warned against permitting "a variation in the result from so slight a change in form" in cases involving the right of qualified voters to participate in the nomination process. *Smith v. Allwright,* 321 U.S. 649, 661 (1944).

But there is a more fundamental reason why preclearance was required. Whatever the formal nature of the RPV's nominating process, the Party was in fact conducting the functional equivalent of a primary, as appellants alleged in their complaint, ¶¶ 13-15. *See also* Atkinson, *supra* at 343 (describing the RPV's 1978 senatorial nominating convention as a "great indoor primary"). The RPV's decision to call its selection mechanism a "convention" rather than a "primary" is no different from the decision of the Texas Jaybirds' -- an informal political association -- to call their nomination process a "straw poll" rather than a "primary." This Court invalidated the Jaybirds' straw poll in *Terry v. Adams*, 345 U.S. 461 (1953). In *Terry*, this Court held that a racially exclusive private organization's restriction of its election *prior to* the primary violated the Fifteenth Amendment because it formed an integral part of the electoral process that ultimately resulted in the election of public officials. As this Court's decision in *Terry* shows, the constitutional guarantee of equality in voting cannot be evaded by verbal quibbling over what a party calls its nominating event. The Voting Rights Act was passed in part precisely to enforce the Fifteenth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. at 326-27.

As the RPV's process actually operated, every voter who was willing to pledge his or her support to the Party's nominee and to pay the filing fee was entitled to be certified as a "delegate." Every voter who showed up at the convention was entitled to vote for the candidate of his or her choice. The "filing fee" was simply the cost of voting. It was the functional equivalent of a poll tax. Under these circumstances, the imposition of the $45 fee as a precondition to casting a vote for a nominee for public office constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Voting at the Republican state convention was not like voting in a private club or voting for members of the All-Star team, *see Chisom v. Roemer*, 111 S.Ct. at 2372 (Scalia, J., dissenting). Instead, it was in every respect part of the electoral process regulated by the Voting Rights Act. Just as clearly, the Party's repeated increases of the fee since November 1, 1964, the triggering date for section 5 coverage, *see* J.S. App. at A-4, represent changes in voting qualifications or prerequisites within the meaning of section 5.

III. THE DISTRICT COURT'S DECISION THAT INDIVIDUALS SUBJECTED TO AN ILLEGAL POLL TAX HAVE NO CAUSE OF ACTION UNDER SECTION 10 OF THE VOTING RIGHTS ACT CONFLICTS WITH CONGRESSIONAL INTENT, THIS COURT'S DECISION IN *ALLEN*, AND THE STRUCTURE OF THE VOTING RIGHTS ACT GENERALLY.

The district court held that private individuals who have been forced to pay an illegal poll tax, or who have been deterred by such a tax from voting at all, have no cause of action under section 10 of the Voting Rights Act, 42 U.S.C. § 1973h, the section of the Act that explicitly outlaws poll taxes. *See* J.S. App. at A-11 to A-12. Its conclusion rests

on two factors: the absence of any express authorization of private lawsuits and the express authorization of suits by the Attorney General.

The first prong of the district court's analysis is completely refuted by this Court's recognition of private rights of action under both sections 2 and 5 of the Act, *neither* of which contains an express private right of action. Nonetheless, Congress clearly intended to permit private enforcement. *See, e.g.*, S. Rep. No. 97-417, p. 30 (1982) ("reiterat[ing]" the existence of a private right of action under Section 2, as has been clearly intended by Congress since 1965").

This Court's analysis of private rights of action in section 5 cases shows the flaws in the district court's reasoning. The district court's reliance on *Allen* was clearly misplaced.

First, *Allen* noted the language in section 5 providing that "no person" should be denied the right to vote by an unprecleared provision. *Id.* at 555. "Analysis of this language in light of the major purposes of the Act indicates that appellants may seek a declaratory judgment" that section 5 preclearance is required. *Id.* Similarly, section 10 of the Act contains congressional findings regarding "the constitutional right of citizens" to vote and highlights the exclusion of "persons of limited means" and the economic hardship imposed on such "persons."

Second, *Allen* noted that section 12(f) of the Act -- its general jurisdictional provision -- grants jurisdiction over suits under the Act to district courts "without regard to whether *a person* asserting rights under the provisions of this Act" has exhausted administrative remedies. *Allen*, 393 U.S. at 555 n.18 (emphasis in *Allen*). Read in tandem with the

general voting rights jurisdictional provision, 28 U.S.C. § 1343, the Court suggested that section 12(f) "might be viewed as authorizing private actions." *Allen*, 393 U.S. at 555 n. 18. Since *Allen*, literally thousands of private plaintiffs have relied on section 12(f) to provide a basis for district court jurisdiction over private lawsuits under a variety of sections of the Act. Appellants' complaint in this case specifically invoked both section 12(f) of the Voting Rights Act and section 1343 as bases for the district court's jurisdiction.

Third, *Allen* explained that the Voting Rights Act's specific authorization of suits by the Attorney General was included "to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." *Allen*, 393 U.S. at 555 n. 18. That is clearly true of section 10(b). Nothing in section 10(b) even remotely suggests that Congress intended to make the Attorney General the sole enforcer of a prohibition on poll taxes. Indeed, the right not to be subject to a poll tax is clearly a private right, as well as a matter of public concern.

Finally, *Allen* declared that "[t]he achievement of the Act's laudable goal could be severely hampered ... if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. at 556. That is as true of actions under section 10 of the Act as it is of those under section 5. Especially given the fact that poll taxes violate both the Equal Protection Clause of the Fourteenth Amendment, *see Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), and the Twenty-Fourth Amendment, it is hardly credible to believe that Congress intended to deny the right to sue to individuals who have been forced to pay an illegal exaction in order to participate, *cf. Harman v. Forssenius*, 380 U.S. at 533 n. 6 (finding individual standing under the Constitution), or to provide no

relief under the Act to individuals who have actually been excluded from the political process. It would be irrational for Congress to exclude from the statutory scheme an action which is available under the constitutional provisions.

CONCLUSION

This case represents a dramatic departure from well-settled law about the scope of section 5 and the right of private parties to enforce the Voting Rights Act . Accordingly, this Court should either summarily reverse the judgment of the court below or should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

CONTENTS OF APPENDIX

OPINION OF MAY 18, 1994

In the United States District Court
for the Western District of Virginia
at Charlottesville

Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly J. Enderson,	]
Plaintiffs,	]
	] Civil Action No.
v.	] 94-0025-C
	]
	] Memorandum
Oliver North for U.S. Senate Committee, Inc., Republican Party of Virginia, and Albemarle County Republican Committee,	] Opinion
Defendants.	]

PER CURIAM:

Fortis Morse, Kenneth Curtis Bartholomew, and Kimberley J. Enderson, plaintiffs, brought this action against the Oliver North for U.S. Senate Committee, Inc. (North Committee), the Republican Party of Virginia (the Party), and the Albemarle County Republican Committee (County Committee), defendants, seeking declaratory, injunctive, and monetary relief and costs for alleged violations of three sections of the Voting Rights Act of 1965, 42 U.S.C. § 1971 et seq., and the Fourteenth and Twenty-Fourth Amendments

to the United States Constitution. This dispute challenges a Party requirement that all persons who wish to become a delegate to the statewide convention to nominate the Party's candidate for United States Senator must pay a nonrefundable registration fee, which is $ 45.00.[1] Jurisdiction of a three-judge district court is claimed on Counts 3 and 4 of the complaint under 42 U.S.C. §§ 1973c & 1973h and 28 U.S.C. § 2284(a).

This case was heard on May 18, 1994, pursuant to order of this court. Now pending before the court are the North Committee's motion to dismiss, the Party and County Committee's joint motion to dismiss, the plaintiffs' motion for a preliminary injunction and plaintiffs' motion for expedited discovery. We grant, as to Counts 3 and 4, the Party and County Committee's joint motion to dismiss. We deny, as to Counts 3 and 4, the plaintiffs' motions for a preliminary injunction and expedited discovery. We find we have no jurisdiction to consider Counts One, Two, and Five of the complaint, and we therefore do not address them. We also do not address the North Committee's motion to dismiss because the action against the North Committee is based solely on Count 5, over which we have no jurisdiction.

I

Taking the facts in the light most favorable to the plaintiffs, we find that on December 16, 1993 the Party issued a call for a state convention, to be held on June 3, 1994, to nominate the Party's candidate for United States Senator. Pursuant to the call, permitted by the Party plan, in order to become a delegate to the convention, the prospective

[1] The registration fee may also be described as $35.00.

delegate must pay a registration fee of $ 45.00, and be selected as a delegate. Delegates are selected in county or city mass meetings, conventions, or party canvasses. As a practical matter, anyone who follows the registration procedure may become a delegate to the state convention. The requirement that a prospective delegate pay a registration fee in order to participate in the Party's nominating process was not in effect on November 1, 1964, but has been authorized by the Party's plan at least since 1987.

The plaintiffs are all registered voters who wish to become delegates to the Party's June convention. Plaintiff Bartholomew was deterred from filing as a delegate by the $ 45.00 fee collected by the County Committee. Plaintiff Enderson was deterred from filing as a delegate in Hampton, Virginia by the $ 45.00 fee collected in Hampton.[2] When plaintiff Morse attempted to register for selection as a delegate at the County Committee's headquarters, he learned of the $ 45.00 fee, which was a larger sum than he currently had in his checking account. Upon inquiring whether he could file without paying the fee, he was informed by a worker at the County Committee's headquarters that some candidates would sponsor voters who supported them. Morse then left the County Committee's headquarters and borrowed the money to pay the fee. Upon his return, his filing form and payment were accepted. By inquiring further, he learned that if he supported Oliver North, he could be reimbursed his registration fee by the North Committee. He then accepted $ 45.00 from the county coordinator for the North Committee and was told that he was expected to be at the June convention. He later repaid the $ 45.00 to the North Committee.

[2] The local party committee for Hampton is not a party to the suit.

Having delayed five months, and almost on the eve of the state convention, plaintiffs filed this suit in which they plead five causes of action: The Party's imposition of a registration fee violates the Twenty-Fourth Amendment's prohibition of poll taxes (Count 1); the Party's imposition of a registration fee violates the Fourteenth Amendment's Equal Protection Clause (Count 2); the Party did not receive preclearance before implementing the registration fee requirement, and the fee is therefore in violation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (Count 3); the imposition of the registration fee prohibits people of limited means from participating in voting in violation of Section 10 of the Voting Rights Act, 42 U.S.C. § 1973h(a) (Count 4); and the North Committee's practice of paying registration fees for prospective delegates who indicate their support for North violates Section 11 of the Voting Rights Act, 42 U.S.C. § 1973i(c) (Count 5).

II

We first turn to the question of jurisdiction of a three-judge court. Plaintiffs' claims under Sections 5 and 10 of the Voting Rights Act, which are Counts 3 and 4 of the complaint, are actions which "shall be heard and determined by a (district) court of three judges." 42 U.S.C. §§ 1973c & 1973h(c); accord 28 U.S.C. § 2284(a); Charles A. Wright, The Law of Federal Courts § 50, at 297 n.14 (4th ed. 1983). A three-judge district court must be convened when so required by an act of Congress. 28 U.S.C. § 2284(a). However, Counts 1, 2, and 5 of plaintiffs' complaint, which allege two constitutional violations and a violation of Section 11 of the Voting Rights Act, 42 U.S.C. § 1973i(c), which addresses itself solely to criminal conduct, are not claims for which Congress has required the convening of a three-judge

court. We are aware that some three-judge district courts have taken the view that when a three-judge court has been properly convened for some claims in which such a court is required it may, in its discretion, exercise jurisdiction over other claims for which a three-judge court is not required. See, e.g., Armour v. Ohio, 775 F. Supp. 1044, 1048 (N.D. Ohio 1991); Tucker v. Montgomery Bd. of Comm'rs, 410 F. Supp. 494, 500 (N.D. Ala. 1976). However, the only district court decision in this circuit to address the question holds to the contrary and is the more persuasive, we think. We thus follow the three-judge panel of the United States District Court for the District of South Carolina which held, "Any rights asserted by the plaintiffs under other federal statutes or Constitutional provisions can be asserted only before the (single-judge) District Court." Gordon v. Executive Comm. of the Democratic Party of Charleston, 335 F. Supp. 166, 170 (D.S.C. 1971) (per curiam). We think the view of that court is consistent with the intent of Congress to limit the jurisdiction of three-judge courts, which resulted in the 1976 legislation repealing 28 U.S.C. §§ 2281 & 2282 and amending 28 U.S.C. § 2284.[3] See Act of August 12, 1976, Pub. L. No.94-381, 90 Stat. 1119 (1976); Wright, supra, at 296-97; see also Perez v. Ledesma, 401 U.S. 82, 87, 27 L. Ed. 2d 701, 91 S. Ct. 674 (1971) ("Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them." (footnote

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[3] In short, unless Congress has provided that a three-judge court must or may be convened to consider a particular claim, the claim may be considered only by a single judge of the district court. For a listing of some mandatory and permissive three-judge court claims, see Wright, supra, at 297 n.14.

omitted)). Accordingly, we do not consider Counts 1, 2, and 5 of the complaint.

III

Count 3 of the complaint alleges that the Party violated Section Five of the Voting Rights Act, 42 U.S.C. § 1973c, by implementing the registration fee requirement, which the Party admits was not in effect on November 1, 1964,[4] without first obtaining preclearance from the Attorney General of the United States. Section Five provides in relevant part:

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or minority language group] . . . and unless and until the

[4] The Attorney General has determined that November 1, 1964 is the appropriate date to use in determining whether Virginia has enacted or sought to administer a different or new voting qualification, procedure, practice, or the like. 28 C.F.R. Part 51 Appendix; see 42 U.S.C. §§ 1973b(b) & 1973c.

> court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

42 U.S.C. § 1973c. Our task in this case is to determine whether a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting, is subject to Section Five of the Voting Rights Act, 42 U.S.C. § 1973c.

As a general rule, political parties, to the extent they are empowered by the State to conduct primary elections for purposes of selecting national convention delegates, are subject to Section Five. See, e.g., MacGuire v. Amos, 343 F. Supp. 119 (M.D. Ala. 1972) (per curiam). Here, however, the Party is not conducting primary elections. Instead, local party members are selecting delegates to the state nominating convention, not through an election, but through local conventions, mass meetings, and party

canvasses. This distinction is meaningful, and because of it, we hold that the imposition of the registration fee challenged here is not subject to Section Five of the Voting Rights Act.

In support of our holding, we first rely on the regulations of the Attorney General. The regulation promulgated pursuant to Section Five makes the same distinction between voting in primary elections and other public electoral functions and other party activities. The regulation states:

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

28 C.F.R. § 51.7 (July 1, 1993). Here, there is no doubt that the Party is not conducting a primary election, and there is no voting as defined.[5] Therefore, under the terms of the regulation, the acts of the Party in this case are not subject to the preclearance requirement.

We also rely on another decision of a three-judge court. In Williams v. Democratic Party of Georgia, No. 16286 (N.D. Ga. April 6, 1972), aff'd, 409 U.S. 809 (1972), the court held that a Party's change in the method of selection of delegates to a national convention from a system in which the delegates were appointed by the party's last candidate for governor to a system in which delegates were chosen in open convention was not subject to the provisions of the Voting Rights Act. Williams, slip op. at 2, 6. Williams was cited and construed in MacGuire, 393 F. Supp. at 121 n.3, that the "Act does not protect one's right to participate in local conventions." Williams was summarily affirmed by the Supreme Court. 409 U.S. at 809. Summary affirmances, while not as conclusive as a formal written opinion, are judgments on the merits and entitled to some precedential weight. We are not free to disregard them. Southern Rwy. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 462, 60 L. Ed. 2d 1017, 99 S. Ct. 2388 (1979); see also Hicks v. Miranda, 422 U.S. 332, 343-44, 45 L. Ed. 2d 223, 95 S. Ct. 2281 (1975).

In accordance with the Attorney General's regulation and the decision discussed above, we hold that the imposition of a registration fee on candidates for delegate to a state party convention who are not chosen in an election and are

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[5] "Voting" is defined as "all action necessary to make a vote effective in any primary, special, or general election." 28 C.F.R. § 51.2.

chosen by local convention, mass meeting, or party canvass is not subject to the Section Five preclearance requirement.

IV

Plaintiffs also allege that the imposition of the registration fee is in effect the requirement of the payment of a poll tax as a precondition for voting in violation of Section Ten of the Act, 42 U.S.C. § 1973h(a). Section Ten provides in relevant part:

> Authority of Attorney General to institute actions for relief against enforcement of poll tax requirement
>
> (b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment, section 2 of the fifteenth amendment and section 2 of the twenty-fourth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) of this section and the purposes of this section.

42 U.S.C. § 1973h(b). As is immediately apparent, the statute does not, on its face, authorize private actions for

violations of Section 10. See Allen v. State Bd. of Elections, 393 U.S. 544, 563, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969) (noting that Section 10 authorizes three-judge courts when the Attorney General brings an action under that section).

In Allen, the Court held that private litigants had standing to sue under Section Five of the Voting Rights Act. 393 U.S. at 557. Section Ten, however, does not contain similar language, but expressly authorizes the Attorney General to bring actions to enforce the section. See United States v. Solomon, 563 F.2d 1121, 1125 n.4 (4th Cir. 1977) (noting, in dictum, that Section Ten authorizes the Attorney General to sue for injunctive relief to prevent enforcement of a poll tax). Thus, we find no basis permitting the plaintiffs to sue under Section Ten. The statute specifically refers to "such actions," which are those instituted by the Attorney General.

V

As to Counts 3 and 4 of the complaint, we grant the Party and County Committee's joint motion to dismiss, but for the reasons expressed in this opinion. To the extent they relate to Counts 3 and 4, we deny the plaintiffs' motions for a preliminary injunction and expedited discovery. The plaintiffs may pursue Counts 1, 2, and 5 in the district court before a single judge should they be so advised.

An appropriate order will be this day entered.

ORDER OF MAY 18, 1994

In the United States District Court
for the Western District of Virginia
at Charlottesville

Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly J. Enderson,	]	
Plaintiffs,	]	
	]	Civil Action No.
v.	]	94-0025-C
	]	
	]	Order
Oliver North for U.S. Senate Committee, Inc., Republican Party of Virginia, and Albemarle County Republican Committee,	]	
Defendants.	]	

ORDER

In accordance with the opinion filed on this date, it is ADJUDGED and ORDERED that Counts 3 and 4 of the complaint shall be, and they hereby are, dismissed with prejudice.

It is further ADJUDGED and ORDERED that the plaintiffs' motions for expedited discovery and a preliminary injunction shall be, and they hereby are, denied so far as they rely upon allegations which may support Counts 3 and 4 of

the complaint.

It is further ADJUDGED and ORDERED that the court declines to act upon Counts 1, 2 and 5 of the complaint, they being without the jurisdiction of the three-judge court.

It is further ADJUDGED and ORDERED that the motion for a preliminary injunction is denied so far as it depends on facts which may support Count 5 of the complaint, the three-judge court being without jurisdiction to decide the same.

The three-judge court has declined to grant any relief in this case. Should the plaintiffs be so advised to seek any other relief, they should address a request for the same to the district court of a single judge, and we express no opinion either as to the merits or any procedural aspect thereof.

Enter this 18th day of May, 1994.

/s/ H. Emory Widener
United States Circuit Judge

/s/ J. H. Michael, Jr.
United States District Judge
Western District of Virginia

/s/ James R. Spencer
United States District Judge
Eastern District of Virginia

STATUTORY PROVISIONS INVOLVED

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c (1988):

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgment of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or

subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the

provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

SECTION 10 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973H

§ 1973h Poll taxes

(a) Congressional finding and declaration of policy against enforced payment of poll taxes as a device to impair voting rights

The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) Authority of Attorney General to institute actions for relief against enforcement of poll tax requirement

In the exercise of the powers of Congress under section 5 of the fourteenth amendment, section 2 of the fifteenth amendment and section 2 of the twenty-fourth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political

subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) Jurisdiction of three judge district courts; appeal to Supreme Court

The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

NOTICE OF APPEAL, JUNE 8, 1994

Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly J. Enderson,	]	
Plaintiffs,	]	
	]	No. 94-0025-C
v.	]	
	]	
	]	
Oliver North for U.S. Senate Committee, Inc., Republican Party of Virginia, and Albemarle County Republican Committee,	]	
	]	
Defendants.	]	

NOTICE OF APPEAL

Notice is hereby given that Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly J. Enderson, plaintiffs in the above named case, hereby appeal to the Supreme Court of the United States of America from the order of the three-judge district court dismissing Counts 3 and 4 of the Complaint with prejudice and denying plaintiffs' Motion for Preliminary Injunction so far as it relies upon Counts 3 and 4 of the Complaint, entered in this action on May 18, 1994.

This appeal is taken under 28 U.S.C. § 1253 and 42 U.S.C. §§ 1973c, 1973h(c).

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Date: June 8, 1994

(2)

No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

APPELLEES' MOTION TO AFFIRM OR DISMISS

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QUESTIONS PRESENTED

1. Do the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, apply to voting in elections, as stated in the text of the Act and implementing regulations, and as determined by existing case law, or should it be held that those requirements extend to delegate filing fees and other rules for party political conventions?

2. Does Section 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, authorizing the Attorney General to institute suit, at his or her discretion, to enjoin those poll taxes in certain areas that meet the criteria specified in that Section, create a private cause of action under the Voting Rights Act?

3. Does a requirement that those who offer themselves as candidate for delegate to a state party convention pay a delegate filing fee constitute a "poll tax" within the meaning of the Voting Rights Act?

4. Is this appeal moot where individual plaintiffs have challenged a private political party's filing fee for delegates attending its state nominating convention where the convention has been held and concluded?

PARTIES TO PROCEEDINGS BELOW

Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly J. Enderson were plaintiffs in the court below. The Oliver North for U.S. Senate Committee, Inc., The Republican Party of Virginia, and The Albemarle County (Virginia) Republican Committee were defendants in the court below. The Oliver North for U.S. Senate Committee, Inc. has been dismissed from this case pursuant to plaintiffs' Fed.R.Civ.P. 41(a)(1)(i) motion filed contemporaneously with their notice of appeal.

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IN THE
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APPELLEES' MOTION TO AFFIRM OR DISMISS

Appellees The Republican Party of Virginia and The Albemarle County Republican Committee (collectively, "the Party") move to summarily affirm the decision below or to dismiss the appeal filed on behalf of Fortis Morse, Kenneth Curtis Bartholomew and Kimberly J. Enderson. The Party respectfully suggests that this case fails to present a substantial question in that the Appellants can show no error by the court below. Instead, Appellants ask this Court to extend Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c ("Section 5") to apply to political conventions contrary to the definitions in the Act and regulations adopted thereunder. Appellants also ask this Court to denominate as a "poll tax" that which has never been so con-

sidered and to create a private cause of action under Section 10 of the Voting Rights Act contrary to the intent of Congress. The court below properly contented itself with construing the language of the statute and following the guidance of precedent, and thus wisely rejected the invitation to extend federal oversight to the internal affairs of those voluntary associations known as political parties.

In the alternative, dismissal is appropriate because the case is moot in that the Party's statewide convention, the filing fee for which was challenged in this action, has been held and concluded. Absent summary affirmance, the case should be dismissed as moot.

I. STATEMENT OF THE CASE

On December 16, 1993 the Party issued a call for a state convention, to be held on June 3, 1994, to nominate the Party's candidate for United States Senator. Pursuant to the call, all registered voters who were in accord with the Party's principles and who were willing if asked to state their intent to support the nominee of the Party were permitted to participate in local mass meetings, canvasses or conventions conducted exclusively by officials of the Party. Those who wished to be selected by such methods as delegates to the state convention were required to pay a registration fee. Under the Party rules, election as a delegate is not automatic. Candidates for delegate may be slated off and, even if elected, may be instructed. In recent years, the campaign organizations of competing candidates for party nomination have eschewed such tactics as a party unity measure. Hence, for purposes of ruling on a motion to dismiss, the court below accepted Appellants' contention that payment of the fee was tantamount to election.

Appellants, three law students at the University of Virginia Law School (collectively, "the Law Students"), are registered voters of Virginia. Appellant Bartholomew alleges that he was deterred from filing as a delegate by the $45.00 fee collected by the Albemarle County Committee. Appellant Enderson alleges that she was deterred from filing as a delegate in Hampton, Virginia by the $45.00 fee collected in Hampton. Appellant Morse paid the fee under complicated circumstances no longer relevant to his claim.

Five months after the call, and five weeks before the convention was scheduled to be held, the Law Students filed suit seeking an injunction against the delegate selection process. The Party timely filed an answer and motion to dismiss under Fed.R.Civ.P. 12(b)(6), which the Party supplemented with an affidavit. The affidavit established that the Party had decided to nominate its candidate for United States Senate by convention in 1964, 1966, 1970, 1972, 1976, 1978, 1982, 1984, and 1988,[1] and that the delegate fee had increased with time since 1964. For purposes of its analysis, the court below found that no fee had been charged in 1964.

After briefing and argument, the three-judge court convened pursuant to the Voting Rights Act denied the Law Students' motion for a preliminary injunction and granted the Party's motion to dismiss the Voting Rights Act claims, holding that Section 5 of the Act applies to voting in elections, and not to delegate selection rules, and that Section 10 of the Act does not support a private right of action. The three-judge court declined jurisdic-

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[1] The Party's Central Committee filled vacancies in 1964 when the convention refused to oppose Sen. Harry F. Byrd, and in 1978 when the convention's nominee was killed in a plane crash. A primary planned in 1990 was cancelled when no opposition candidate came forward.

tion over several claims not made under the Voting Rights Act, leaving the plaintiffs free to pursue such claims before a single judge if they were so advised. The Law Students do not challenge this jurisdictional ruling. This appeal followed.

II. ARGUMENT

A. THE LAW STUDENTS SEEK TO EXTEND THE PRECLEARANCE REQUIREMENTS OF SECTION 5 OF THE VOTING RIGHTS ACT BEYOND THE STATUTE'S EXPRESS DEFINITION OF "VOTING" TO INTRUDE ON FUNDAMENTAL RIGHTS OF FREE POLITICAL ASSOCIATION.

The decision of the court below should be summarily affirmed because the Law Students have failed to present a substantial issue of federal law to the Court. Instead, the Law Students ask this Court to take precisely the step rejected in *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)(per curiam), to interject the federal courts into the issue of seating delegates at a political convention. In *O'Brien v. Brown*, the Court found a complete absence of authority for such action, saying:

> . . . [N]o holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature. . . . Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties.

Id. The decisions of this Court and of the courts below in applying the Voting Rights Act have, consistent with the intent and language of the Act, restricted the Act to matters affecting voting in general, primary, or special elections, not political party conventions. The Law Students thus ask for a radical ruling from this Court, a ruling that no court has ever made, that is contrary to such case authority as does exist, and contrary as well to the clear language of the Voting Rights Act.

1. Section 5 applies to voting in elections, not to the internal procedures of political parties.

The Law Students claim that the charging of a filing fee to delegates to the Party's convention is a change that requires preclearance under Section 5 of the Voting Rights Act. Section 5 requires preclearance of any change by a state or political subdivision of ". . . any voting qualification or prerequisite to voting or standard practice or procedure for voting . . ." that is different from what was in effect on November 1, 1964. 42 U.S.C. § 1973c.

The applicability of Section 5 to the Party's filing fee is refuted on the face of the statute. There must be a change in a standard or precondition to voting. "Voting" is a defined term in Section 14 of the Voting Rights Act, and voting is defined in terms of voting in an election. It includes " ... all action necessary to make a vote effective in any primary, special or general *election* ...". 42 U.S.C. § 1973l (emphasis added). "Voting" means voting in a public election, not participation in a party convention.

In its recent treatment of Section 5 of the Voting Rights Act, *Presley v. Etowah County Commission*, ___ U.S.___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), the Court held that the Voting Rights Act is not an all-purpose antidiscrimination statute. The Court reviewed its decisions under the Act since *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and summed them up as revealing "a consistent requirement that changes subject to § 5 pertain only to voting." *Id.* at ___, 112 S.Ct. at 828, 117 L.Ed.2d at 63. *Presley* concerned a resolution to change the authority of individual county commissioners over road maintenance funds. Under the facts presented in *Presley*, the Court said:

> The . . . Resolution is not a change within any of the categories recognized in *Allen* or our later cases. It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for its does not increase or diminish the number of officials for whom the electorate may vote. Rather, the Common Fund Resolution concerns the internal operations of an elected body.

Id. at ___, 112 S.Ct. at 829, 117 L.Ed.2d at 64. No more can be said of the conduct challenged here, conduct which does not affect voting or voting power, yet the Court said in *Presley*, "[A] faithful effort to implement the statute must begin by drawing lines between those *governmental* decisions that involve voting and those that do not." *Id.* (emphasis added).

The Court rejected arguments that Section 5 covered changes in government operations affecting an elected official's authority, saying such a result would expand the coverage of

Section 5 well beyond the statutory language and the intent of Congress. *Id.* at ___, 112 S.Ct. at 830, 117 L.Ed.2d at 65. The Court continued:

> The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered state illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Id.

If Section 5 cannot reach the internal operations of an elected body, there is no reasonable construction of its terms that will support its reaching the internal deliberations of a private body, particularly the decisions of a political party as to who may attend its convention. Indeed, if the delegate fee requires preclearance, what convention or pre-convention rule does not? And what "workable rule" could be devised for preclearing the rules of a convention, which are not adopted until the convention itself, and remain subject to change by the convention? For that matter, if the Attorney General of one party were responsible for preclearing the rules of the opposing party, would the motivation toward "workable rules" always be present?

Not only are convention rules outside the sweep of the Act, but any attempt artificially to extend the sweep of the Act should be viewed with disfavor. In *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1980), this Court considered a Wisconsin law purporting to bind the delegates to the National Democratic Party convention to vote for the candidates on whose slate they ran. The Court rejected the State's argument that the statute was authorized by Art. II, § 1, cl. 2 of the U.S. Constitution, conferring power on the states to appoint presidential electors, saying:

> Any connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance. In [*Cousins v. Wigoda*, 419 U.S. 477 (1975)], despite similar arguments by Illinois, all nine justices agreed that a State cannot constitutionally compel a national political convention to seat delegates against its will.

Id. at 125 n. 31.

2. Section 5's limited applicability to political parties depends upon the presence of delegated state electoral functions.

The challenged action of the Party does not relate to "voting" as defined in the Act. Furthermore, the Law Students have failed to demonstrate that the challenged conduct involves the delegation of a public electoral function. The regulation relied upon by both the lower court and the Law Students, 28 C.F.R. § 51.7, defines the applicability of Section 5's preclearance requirements to political parties. A change affecting voting (*i.e.*, as defined in the Act) made by a political party is subject to preclearance if the change relates to a public electoral function of the party, and the party acts under authority explicitly or implicitly granted by a covered jurisdiction or subunit itself subject to the preclearance requirement of Section 5. 28 C.F.R. § 51.7 (1993). The sole example given by the regulation of a covered change is a change with respect to the conduct of primary elections. *Id.*

The Law Students' construction of the Virginia statutes cited, Jurisdictional Statement ("J.S.") at 10, 11, is an attempt to shoehorn the present case into the delegated state function provisions of 28 C.F.R. § 51.7 or the rule of pre-Voting Rights Act cases such as *Smith v. Allwright*, 321 U.S. 649 (1944). The Virginia statutes cited will not bear the construction advanced by the Law Students. Va. Code § 24.2-509(A) is declaratory of rights a political party has independent of the state. There is no delegation of state power or authority to the party. Va. Code § 24.2-509(A) is merely prefatory to § 24.2-509(B), which purports to grant incumbent General Assembly members limited rights in the decision concerning nomination methods. The latter provision has no application to the Party's 1994 convention, and moreover is itself of dubious constitutionality. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 227 (1989). Va. Code § 24.2-510 merely sets deadlines for parties to complete their nominating process in order to get their candidate on the general election ballot. Va. Code § 24.2-511 sets the procedure for notifying state officials of the nominees to be placed on the general election ballot. By no stretch of construction can these statutes be held to constitute a delegation of state authority in a political party's exercise of its associational rights in conducting a political convention.

The pre-Voting Rights Act cases relied upon by the Law Students are equally inapposite. *Smith v. Allwright* involved the exclusion of black voters from state Democratic primary elections in Texas. Once the Court determined that there was state action sufficient to invoke the 15th Amendment, it voided the challenged conduct, 321 U.S. at 662.

Terry v. Adams, 345 U.S. 461 (1953), also cited by the Law Students, represented the Court's invalidation of what it called "a plan purposefully designed to exclude Negroes from voting and at the same time escape the 15th Amendment." *Id.* at

463-464. It is not, as the Law Students suggest, J.S. at 18, a blanket extension of federal authority over pre-primary political activity, but rather a determination that a state cannot evade the 15th Amendment by subterfuge. In *O'Brien v. Brown, supra*, the Court, in considering a challenge to convention delegate selection, distinguished *Smith v. Allwright* and *Terry v. Adams* as cases involving claims of invidious racial discrimination *in a primary contest*. 409 U.S. at 4 n. 1 (emphasis added). Here, of course, there has been no suggestion of an allegation that the delegate fee was intended to or actually had a racially discriminatory impact. Moreover, the cases relied on by the Law Students were decided on constitutional grounds long before the Voting Rights Act was enacted. As the District Court noted in *Williams v. Democratic Party of Ga.*, No. 16286 (N.D.Ga. April 6, 1972), *aff'd.*, 409 U.S. 809 (1972), the meaning of state action in Section 5 is a question of statutory construction separate and apart from the meaning of state action in other contexts. *Williams, supra*, Slip Op. at 5.

The Party's selection of delegates to attend its convention, and its selection of methods to choose those delegates, are intra-Party matters, not delegated public electoral functions. Neither the Commonwealth of Virginia, nor any political subdivision thereof, has authority over such proceedings which it could delegate. Indeed, any assertion of such authority would violate the 14th Amendment. *Democratic Party of U.S.*, 450 U.S. at 121-122.

3. The Law Students' contention that Section 5 covers the Party's delegate filing fee is contrary to existing case authority.

The court below not only relied upon the statute and regulations, and but also followed existing case law, particularly *Williams v. Democratic Party of Ga., supra*. Despite the attempts

of the Law Students to turn this decision on its head, the court in *Williams* squarely held that the Voting Rights Act does not apply to procedures for the selection of convention delegates.

Williams involved a Section 5 challenge to new rules promulgated by the Georgia State Democratic Party for selection of delegates to the National Convention in open conventions, replacing a system of appointment by the party's previous gubernatorial candidate. *Williams*, Slip Op. at 2. The court cited the requirement of Section 5 for state action, and the definition of voting in Section 14, and concluded that Section 5 did not reach the party delegate selection rules. The court reasoned that the party's adoption of the rules did not constitute state action as required under Section 5. Slip Op. at 5. Contrary to the suggestion of the Law Students, the holding of the Court could hardly be less ambiguous. Slip Op. at 6.

The court in *Williams* explicitly considered, even to the extent of quoting, the language in the House Judiciary Committee report on the definition of "voting" in the Voting Rights Act upon which the Law Students now rely:

> Clause (1) of this subsection contains a definition of the term "vote" for the purposes of all sections of the Act. The definition makes it clear that the act extends to all elections - Federal, State, local, primary special or general - and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to election of candidates for "party" offices. *Thus, for example, an election of delegates to a State party convention would be covered by the Act.*

Williams, Slip Op. at 4 (citing 1965 U.S. Code Cong. & Admin. News, 2464) (emphasis in original). Nevertheless, the court went on to hold that Section 5 of the Act did not reach a change in state party rules for the selection of delegates to the national party convention. Contrary to the argument of the Law Students, J.S. at 12, the *ejusdem generis* rule of construction confines the general word "election" to the class and may not be used to enlarge it. *See, e.g., Cleveland v. U.S.*, 329 U.S. 14, 18 (1946).

The construction advanced by the Law Students is further undermined by the regulations of the Attorney General, whose interpretation the Law Students argue is entitled to "considerable deference". J.S. at 9. The regulation states: "Changes with respect to the conduct of *primary elections* at which party nominees, delegates to party, conventions, or party officials are chosen are subject to the preclearance requirement of section 5." 28 C.F.R. § 51.7 (emphasis added).

Obviously, the Voting Rights Act applies to, for example, presidential preference primary elections in which national convention delegates are chosen. But the definitions in the Act and the regulations are consistent in limiting coverage under Section 5 to changes involving voting in elections.

The Law Students argue that the court in *Williams* would reach a different result now that the Attorney General has created a mechanism for political parties to apply directly for preclearance of items covered by Section 5. For purposes of this case, those regulations, which can shed no light Congress' intent in passing the Voting Rights Act, are a mere tautology. The fact that a procedure exists for preclearing primary election rule changes in no way suggests that the Act should be extended to rules for conducting political conventions.

The Law Students themselves cite *MacGuire v. Amos*, 343 F.Supp. 119 (M.D.Ala. 1972)(three-judge court)(per curiam), J.S. at 8, which relies on *Williams* in concluding that the Voting Rights Act does not protect an individual's right to participate in local conventions. 343 F. Supp. at 121 n. 3. The remaining authority cited by the Law Students is not to the contrary. *Hawthorne v. Baker*, 750 F.Supp. 1090, 1095 (M.D.Ala. 1990)(three-judge court), *vacated,* 499 U.S. 933 (1991), held that the State Democratic Party was covered by Section 5 to the extent it was empowered to conduct primary elections under state law, and in any event was vacated by this Court. *Fortune v. Kings County Democratic County Comm.*, 598 F.Supp. 761, 765 (E.D.N.Y. 1984)(three-judge court), held that election rules for the county executive committee were covered by Section 5 because of delegated public electoral functions. *Wilson v. N.C. State Bd. of Elections*, 317 F.Supp. 1299, 1302 (M.D.N.C. 1970)(three-judge court), held that an intra-party agreement was subject to Section 5 when it was given force of law under a state statute.

The Law Students' citation of cases dealing with filing fees for candidacy for public office are simply inapposite. *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), involved a regulation by a local school board, as a political subdivision of the state, affecting employees who were candidates for public office. *Id.* at 45, 36. *See also Bullock v. Carter*, 405 U.S. 134, 138 (1972)(filing fee in state primary election). Like "voting", the terms "filing fees", "candidates", and "party office" must all be understood in the context of elections.

Simply put, the Voting Rights Act applies to voting in public elections. It does not apply to party nominating conventions. Even where Section 5 reaches party primary elections, coverage is premised on state involvement or state delegation of public election functions to the political party. 28 C.F.R. § 51.7.

The Court's decisions concerning the First Amendment associational rights of political parties further support the decision below. The Court has consistently and repeatedly rejected state attempts to regulate political parties' internal affairs. *Democratic Party of U.S.*, *supra*, at 121-122. *See also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. at 227 (state cannot enact law to prevent parties from taking internal steps affecting their own process for selection of candidates). As *O'Brien v. Brown*, *supra*, observed, the federal courts cannot undertake to regulate selection of convention delegates without implicating First Amendment associational rights.

In holding that the distinction between a party's exercise of delegated public electoral functions and its conduct of its own convention was dispositive as to the issue of Section 5 coverage, the court below honored the language of the Act, and regulations, sound precedent, and good policy. By all of these standards, the Party's conduct of its own nominating convention is not covered by Section 5.

4. There is no basis in law or fact for treating the Republican convention as a *sub rosa* primary.

Tacitly acknowledging the overwhelming authority against extending the Voting Rights Act to cover political conventions, the Law Students argue that the Republican convention in Virginia should be treated as though it were a primary. The argument, however, is extralegal and entirely metaphorical.

The Law Students quote from a book by Frank B. Atkinson, *The Dynamic Dominion*, for the proposition that Virginia Republican conventions have been called a "great indoor primary" because of their size. The description in the Atkinson

book was itself a quotation from a newspaper column by Charles McDowell in the Richmond *Times-Dispatch* describing the 1978 Republican convention. *Id.* at 354.

Having argued that the Republican Party of Virginia has been successful in conducting large popular conventions over the last sixteen years and that in recent years such conventions have been relatively open, the Law Students are at an analytical loss in explaining why these facts should affect the proper construction of the Voting Rights Act. Although the Law Students cite *Terry v. Adams*, *supra*, for the proposition that courts will not permit white primaries to be conducted by subterfuge, they admit that nothing of the sort is going on here. J.S. at 3, 11 n. 9, 19. Far from charging subterfuge or racial animus, the gravamen of the Law Students' complaint is that *anybody* may attend if he or she pays a modest fee and is prepared to state his or her intent to support the Party's nominee.

Lacking applicable law or legally significant facts, the Law Students' position appears to reflect nothing more than a distrust of unregulated associations and a disapproval of fees.

B. BY ITS NATURE, CONTENT AND HISTORY, SECTION 10 OF THE VOTING RIGHTS ACT CANNOT SUPPORT A PRIVATE RIGHT OF ACTION.

The court below disposed of the Law Students' poll tax claim on the procedural ground that Section 10 of the Voting Rights Act, 42 U.S.C. § 1973h ("Section 10"), authorized the Attorney General, but not a private citizen, to bring an action before a three-judge court. Although the Law Students vigorously challenge this holding, the conclusion of the lower court was certainly correct. As this Court said twenty-five years ago in *Allen v. State Board of Elections*, *supra*, Section 10 "... con-

tains a provision authorizing a three-judge court *when the Attorney General brings an action* 'against the enforcement of any requirement of the payment of a poll tax as a precondition to voting ...'". 393 U.S. at 563 (emphasis added).

The Law Students' claim that there exists a private right of action under Section 10 ignores the history of poll tax legislation. The necessary premise of the Law Students' argument is that Section 10 outlawed poll taxes. J.S. at 19. It did not. Poll taxes in federal elections were abolished by the 24th Amendment. Poll taxes in state elections were held unconstitutional under the Equal Protection Clause of the 14th Amendment in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), *after* the enactment of the Voting Rights Act in 1965. If the Law Students' construction of Section 10 were correct, the Court need not have wasted its time deciding *Harper*, which would have been mooted by enactment of the Voting Rights Act the year before.

A review of the enactment of Section 10 is instructive. The House Judiciary Committee reported a bill that would have abolished the poll tax in any State or subdivision where it still existed. H.R.Rep. 439, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437. But the Report shows that Congress entertained substantial doubt concerning its power to abolish poll taxes by legislation. *See* H.R.Rep. 439, 1965 U.S. Code Cong & Admin. News at 2479, 2480 (citing the Attorney General's testimony that Congressional abolishment of poll taxes without evidence of specific discriminatory effect raised "the substantial risk of unconstitutionality", and other authorities to the same effect); *see also Harper*, 383 U.S. at 580 n. 2 (Harlan, J., dissenting) (citing doubt expressed in Senate hearings on passage of the Voting Rights Act whether state poll taxes validly could be abolished through exercise of Congress' legislative power). In the end, Congress rejected the House bill's flat prohibition

and enacted the present Section 10. Conference Report No. 711 *reprinted in* 1965 U.S. Code Cong. & Admin. News 2578, 2580.

In *Harper*, the Court understood that it was outlawing state poll taxes and that up to that time Congress had not done so. 383 U.S. at 666 n. 4, and 680 (Harlan, J., dissenting). Indeed, the majority opinion does not even reference Section 10 or the Voting Rights Act, although it refers to two three-judge district court decisions in cases brought under Section 10, holding poll taxes unconstitutional in Texas and Alabama, respectively. 383 U.S. at 555 n. 4 (citing *U.S. v. Texas*, 252 F.Supp. 234 (W.D.Tex.)(three-judge court), *aff'd.*, 384 U.S. 155 (1966), and *U.S. v. Alabama*, 252 F.Supp. 95 (M.D.Ala. 1966)(three-judge court)).

Section 10 was a narrow compromise authorizing the Attorney General to bring suit where he found that certain conditions were met. This is what the statute says on its face. The Section contemplated specific evidentiary determination of discriminatory purpose or effect before a state law could be held unconstitutional. *See U.S. v. Texas*, 252 F.Supp. at 236; *U.S. v. Alabama*, 252 F.Supp. at 98-99. The Law Students' contention that Section 10 abolished state poll taxes is at odds with *Harper* and the case law as well as the statute and its legislative history.

A statute which does not ban the poll tax, but which grants discretion to the Attorney General to selectively attack poll tax provisions obviously does not create a private cause of action. Whatever rights citizens may have under the 24th Amendment or *Harper*, those claims, the lower court held, cannot be pursued under the Voting Rights Act. Having failed to appeal the jurisdictional ruling that a three-judge court will not hear non-Voting Rights issues, the Law Students' appeal fails absolutely once the standing determination is affirmed.

C. A DELEGATE REGISTRATION FEE AT A STATE CONVENTION IS NOT A POLL TAX.

Historically, it is clear what a poll tax is. A poll tax is a head tax imposed by the state. *U.S. v. Alabama*, 252 F.Supp. at 97. This head tax must be paid before the right of franchise can be enjoyed. *Harper*, 383 U.S. at 664 n. 1, 666 n. 3. Because of the tendency for states which wished to depress the votes of racial minorities or the non-affluent to require the payment of poll taxes at times or in places which were difficult and inconvenient, *see Harman v. Forssenius*, 380 U.S. 528, 539-540 (1965), poll taxes as a condition for voting were prohibited by the 24th Amendment in federal elections and proscribed in state elections by *Harper*'s determination that the right to vote could not be burdened financially.

The payment at issue here is not a poll tax. Not being imposed by the state, it is not a tax at all. Not being a burden on the right to vote in an election, it is not a poll tax. Once again, the Law Students confuse legal categories with metaphor. The fact that a delegate filing fee and a poll tax both involve the payment of money hardly permits the former to be redefined into the latter.

D. THE LAW STUDENTS FAILED TO CHALLENGE THE METHOD OF SELECTION OF DELEGATES BELOW AND CANNOT RAISE THIS ISSUE ON APPEAL.

At points in their brief, *e.g.*, J.S. at 14-16, the Law Students appear to complain that the abortive change from convention to primary in 1990 required preclearance. The Law Students emphasize this point in suggesting, contrary to the ruling below, that the lower court has approved a change in methods

of public election. *Id.* It is difficult to see why the events of 1990 would affect the Party's entitlement to continue its consistent practice of conventions. But in any event, this issue was not pled, briefed, argued or decided in the court below. As a natural and proper result, the lower court's decision does not address it. This Court will not decide a question not raised or addressed in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

E. THE LAW STUDENTS' CLAIMS CONCERNING THE CONVENTION FILING FEE ARE MOOT BECAUSE THE CONVENTION HAS BEEN HELD AND CONCLUDED.

This Court has consistently held that claims concerning conventions and elections are moot once the activity to which the challenge pertains has been concluded. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979); *Cousins v. Wigoda*, 409 U.S. 1201, 1204 (1979)(per curiam); *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969)(per curiam); *Hall v. Beals*, 396 U.S. 45, 48 (1969)(per curiam); *Richardson v. McChesney*, 218 U.S. 487, 492 (1910); *Mills v. Green*, 159 U.S. 651, 657-658 (1895).

The Court on occasions has held that occurrence of the election or convention will not moot a challenge when the matter challenged is "capable of repetition, yet evading review." This exception to mootness applies when (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Here it is clear that the issues are capable of litigation in the time permitted. As the court below found, the Law Students delayed five months in bringing the action originally. J.S. App. at A-5. Only four months later, the case has been decided below and briefed in this Court. A timely challenge can be litigated on its merits in the time available.

Moreover, the Law Students have failed to show that there is any reasonable expectation that they will be subject to the same action in the future. In the context of elections or conventions, challenged practices are deemed likely to recur where they are required by statute or other generally applicable requirement. *See, e.g., Fishman v. Schaffer*, 429 U.S. 1325, 1329 n. 4 (1969)(state statute governing access to ballot through nominating petitions); *Democratic Party of U.S.*, 450 U.S. at 115 n. 13 (order of state's highest court applicable to future elections); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983) (action challenging constitutionality of a state's early filing deadline); *Storer v. Brown*, 415 U.S. 724, 737 n. 8, *reh'g denied*, 417 U.S. 926 (1974) (action challenging constitutionality of state election laws governing access to ballot for independent candidates); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)(Illinois state nominating petition statute). Here, the Party is not required by any law or rule to impose a fee. In the future the Party could abolish the fee, increase it, decrease it, or make it waivable as suggested by the Law Students.

Furthermore, there is nothing in the allegations of the Law Students or the facts found by the court below to indicate that the Law Students intend to participate in any future Party convention. In *Brockington v. Rhodes, supra*, this Court held that an action challenging the validity of a state statute which required signatures on a nominating petition for an independent candidate to the United States Congress was rendered moot by the occurrence of the election in which he sought to run. The

candidate did not allege that he intended to run for office in any future election, nor did he attempt to maintain a class action on behalf of other putative individual candidates, present or future, or on behalf of other independent voters. 396 U.S. at 42-43. Here, of course, it is unknown whether the Law Students will desire to be delegates in the future, will be charged fees in the future, or, indeed, will be qualified to be delegates at all by residence or party affiliation. Lawsuits should not proceed on hypothetical, abstract or pedagogical interests.

CONCLUSION

For the reasons set forth above, the court should summarily affirm the well-reasoned decision of the three-judge district court or dismiss the appeal.

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(3)

No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

OLIVER NORTH FOR U.S. SENATE COMMITTEE, INC., REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

Appellees, the Republican Party of Virginia and the Albemarle County Republican Committee (hereafter "RPV" or "Party"), concede, as they must, that the Party chooses delegates to its state nominating convention through "election." Motion to Dismiss or Affirm at 2. They acknowledge for purposes of this lawsuit, again as they must, that any registered voter who affirms allegiance to the Party's nominee and pays a registration fee is entitled to attend the convention and once there can vote as he or she sees fit. *Id.* Finally, they admit that the Party has changed, and contemplates future changes in, the registration fees charged to voters who wish to be "elected" as delegates. *Id.* at 20.

These concessions make clear that the district court's decision cannot stand. The Voting Rights Act expressly applies to *any* election with respect to candidates *for party office*, 42 U.S.C. § 1973*l*(c)(1). Delegates to a party convention are clearly covered: the legislative history of § 5 squarely states that "*an election of delegates to a State party convention would be covered by the Act.*" H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464.

The Party's Motion seeks to obscure this obvious outcome with a tissue of legal and factual misrepresentation.[1]

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[1] Throughout their Motion to Dismiss or Affirm, the Party refers to appellants as "the Law Students," apparently to suggest to the Court that this case is based on "hypothetical, abstract, or pedagogical interests." Motion to Dismiss or Affirm at 21. But it is precisely citizens with limited budgets, like law students, who are deterred from participating or are unfairly burdened by the imposition of a sizeable registration fee. The RPV's brief ignores law students' long history of vindicating their civil rights before this Court. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *cf. Dunn v. Blumstein*, 405 U.S. 330 (1968) (registered voter who was a law professor successfully challenged

The Party ignores the procedural posture of the case -- before this Court on a Rule 12(b)(6) motion to dismiss -- and disputes facts that must be accepted as true. It misconstrues and distorts the case law. And it airily suggests that its contested exaction of a filing fee from appellant Morse is moot, despite its keeping that fee and its announced intention to continue the practice of charging, and changing, registration fees. Failing to meet the central issues of the case, appellees have apparently conceded that these issues are worthy of plenary review by this Court.

I. Section 5 of the Voting Rights Act Clearly Reaches Changes in Party Rules Governing the Nomination of Candidates to Federal Office

As the Jurisdictional Statement shows, the language, legislative history, administrative interpretation, and case law of § 5 have always required preclearance of party rules related to electing candidates to party office and nominating candidates for public office. *See* Juris. St. at 8-11, 13-14. Section 5 has consistently been applied to party rules that provide alternatives to nominating candidates through formal primaries. See Juris. St. at 10 (citing case law and administrative practice).

The RPV counters this consistent application of § 5 with reliance on the sole exception -- *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. Apr. 6, 1972), *summarily aff'd*, 409 U.S. 809 (1972). An honest reading of *Williams*, however, shows that the RPV and the court below seriously misconstrued the case. *Williams* recognized that

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Tennessee's durational residency requirement). In any event, appellants' status as law students is irrelevant to their right to participate in a fair and legal political process, and the Party did not deny appellants' qualifications to bring this lawsuit in its answer to the complaint.

Congress intended § 5 to reach the rules governing the election of delegates to state party conventions -- the practice challenged in this case. *Williams* slip op. at 4. But the *Williams* court reluctantly concluded that preclearance could not be required because no procedure then existed to enable political parties to submit changes for preclearance.[2] Whatever may have been true in 1972, current Department of Justice regulations contain exactly such a mechanism. *See* 28 C.F.R. § 51.23(b) (1993) ("A change effected by a political party (see § 51.7) may be submitted by an appropriate official of the political party."). Thus, the factual predicate on which the *Williams* court rested its entire holding no longer exists. *Williams* would be decided in appellants' favor today. There is, in short, no legal authority for the RPV's construction of § 5.

But the RPV does not simply misconstrue the law; it misapplies the facts as well. The facts alleged by appellants must be taken as true at this stage of the litigation. Qualified voters are "elected" as delegates; as a practical matter any voter who pays the Party's fee and signs a loyalty pledge can be elected; and delegates "cast votes" at the State Convention, which is essentially a mass meeting. Complaint ¶¶ 13-15. Two characterizations of these facts are possible: (1) the RPV operates a de facto primary; (2) the RPV's rules require the election of delegates to a state convention. On either characterization, § 5 covers the RPV's rules.

The RPV's argument -- that at the convention no

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2 "[I]f the Act applied to the rules and regulations promulgated by the State Party, there would be no way for the State Party to gain the required federal approval." Slip op. at 5. Of course, under the present regulations, there *is* a procedure for submission by a political party, *see* 28 C.F.R. § 51.23(b), and contrary to the *Williams* court's assumption, sole responsibility is *not* placed in the state's chief legal officer, *see* 28 C.F.R. § 51.23(a).

"voting" occurs because as a formal matter the voters are "delegates" to a "convention" -- disputes the first proposition only to concede the second. If the convention involves elected delegates -- and the RPV's own papers repeatedly refer to the "election" of delegates, *see* Motion to Dismiss at 2; Juris. St. at 17-18 (citing statements regarding the election of delegates in prior papers filed by the RPV) -- then the clear consequence of the RPV's *own factual assertions* is that preclearance is required for changes in the rules restricting eligibility for election to the position of delegate to those who pay a fee. The RPV concedes that it has repeatedly changed those rules, and that the present $45 fee has never been precleared.

The RPV's characterization of its process as a convention is irrelevant. It can hardly be disputed that the decision to replace a primary election by a convention, or the reverse, is covered by § 5. *See* Juris. St. at 15.[3] The RPV maintains nonetheless, and the district court agreed, that having once chosen to abandon primary elections and institute

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[3] Perhaps the RPV means to dispute even this undoubtedly settled proposition. It asserts that there is no state involvement in their activities because appellants have misconstrued the relevant state statutes. *See* Motion to Dismiss at 9. This proposition is absurd. Section 24.2-511 accords the Virginia Republican Party preferential access to the general election ballot for its nominees. This is the same state involvement in the candidate selection process found in *Smith v. Allwright*, 321 U.S. 649 (1944), in which appellees concede that state action was properly found.

The RPV made precisely such a change in 1994, altering its rules from those of 1990, which called for a primary. Preclearance was not sought, forming part of the gravamen of appellants' complaint. The RPV's contention that this issue was not raised below is specious. Had the party used a primary, it clearly could not have imposed a fee on voters who wished to participate. A challenge to the party's decision to impose a fee clearly embraces the party's decision to use a nominating method that involves such a fee.

a "convention" of whatever type, appellees were free of all further preclearance obligations.

This fallacy of this reasoning is evident. No meaningful federal oversight would be possible if parties had only to recast their primaries as conventions, reimposing restrictions on participation that would not have met the scrutiny of the Attorney General. The disgraceful "white primary" schemes condemned under the Fifteenth Amendment in *Smith v. Allwright* and *Terry v. Adams*, 345 U.S. 461 (1953), would escape the reach of § 5 under this interpretation--a result which appellees baldly assert is in keeping with congressional intent, despite unquestionable evidence to the contrary.

The RPV's interpretion of § 5 is completely at odds with the Attorney General's administrative interpretation of the Act, which is entitled to "considerable deference." *See* Juris. St. at 9. Appellees' obfuscatory maneuvering around this issue requires them to treat an example from 28 CFR § 51.7 as a limitation on the scope of the entire regulation, in a fashion entirely inconsistent with the Justice Department's interpretation of its own regulation. *See* Juris. St. at 10-11.

The district court's decision is wrong for a simple reason: it proves too much. If, for example, the Party had conditioned participation in the state convention or local meetings to elect delegates on a voter's race, or had established different fees for delegates based upon the candidate supported, the district court's logic would still result in a holding that the rule was not subject to § 5 preclearance. That clearly cannot be the law. There is no evidence whatever that Congress intended such a result, and appellees' argument is a lengthy digression intended to lead away from that simple fact.

The RPV's reliance on *Presley v. Etowah County*

Commission, 112 S.Ct. 820 (1992), is particularly unjustified. The internal operations of the county commissions at issue in that case are in no sense comparable to the simple fee imposition challenged here. *Presley* itself recognizes that if the defendant jurisdiction had "alter[ed] or impose[d] ... candidacy qualifications or requirements" or had changed "the composition of the electorate," preclearance would have been required. 112 S.Ct. at 829. That is *precisely* what appellants in this case challenge -- the imposition of a filing fee as a qualification for candidacy as a delegate and the exclusion from the Republican electorate of voters who cannot or will not pay a $45 fee to participate. Far from undermining appellants' arguments, *Presley* shows the continued vitality of § 5's coverage of the changes challenged here.[4]

II. The RPV's Constitutional Argument Is Meritless

The RPV defends the judgment below on the alternative ground that applying the Voting Rights Act to political parties

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[4] The Party's reliance on *O'Brien v. Brown*, 409 U.S. 1 (1972), is equally unavailing. The RPV seems to think that *O'Brien* provides authority for the proposition that the Voting Rights Act has no application to conventions. But this Court ultimately dismissed the petition for certiorari in *O'Brien* on grounds of mootness, 409 U.S. 816 (1972), and explicitly declined to reach the merits, *see* 409 U.S. at 4. And *O'Brien* was not a case raising a § 5 claim in the first place. Moreover, *O'Brien* raised questions concerning "the deliberative processes of a national political convention," 409 U.S. at 5, a far cry from this case, which challenges only rules about whether formal participation in a state nominating convention of otherwise qualified voters can be restricted based on their ability or willingness to pay. Similarly, appellees repeatedly assert that appellants seek "a ruling that no court has ever made," Motion to Dismiss at 5, without mentioning that the RPV's imposition of a nonwaivable fee to participate in its statewide nominating proceedings is unique. The RPV draws an inappropriate inference from the fact that no other court has invalidated a practice no other party has had the effrontery to attempt.

would be unconstitutional. *See* Motion at 9-10, 14. Merely to catalog the implications of this position demonstrate its lack of merit. Under the RPV's theory, if a political party decided to permit only whites to serve as delegates to its nominating convention, Congress could not reach that racist policy. Similarly, if a political party decided to charge white voters $45 and black voters $100 to serve as delegates to a state convention called to nominate a candidate for federal office, Congress would again be unable to protect the political rights of black citizens. Clearly, the RPV is unwilling to push its argument to this conclusion, as its lip service to *Smith v. Allwright* and *Terry v. Adams* shows. But if such blatantly racist changes would be covered by § 5, then the fee challenged in this lawsuit is covered as well, because the only question in a § 5 coverage lawsuit like this one is whether the challenged practice involves a change with respect to voting, *not* whether the change has a discriminatory purpose or effect. *See, e.g., NAACP v. Hampton County*, 470 U.S. 166, 180-81 (1985) (even changes "undertaken in good faith" or which seem to be "an improvement over prior voting procedures" require preclearance, since "it is not our province, nor that of the District Court below, to determine whether the changes ... in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia."); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971) (same). Given that the current fee involves a change from the practice in effect as of § 5's coverage date, preclearance is required.

III. Private Parties Can Bring Actions Under Section 10

Contrary to the RPV's somewhat tortuous argument, nothing in § 10 of the Voting Rights Act establishes the Attorney General as the sole possessor of a right of action for

relief of voters from unconstitutional poll taxes. *See* Juris. St. at 19-22.

The RPV argues that because at the time of adoption of the Act in 1965 this Court had not yet decided *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), and accordingly not all state-imposed poll taxes had yet been held unconstitutional, discretion was vested in the Attorney General to attack certain poll taxes, and this discretion is incompatible with the existence of a private right of action. The sole source for this somewhat convoluted argument is a statement in Justice Harlan's *dissent* in *Harper* that congressional power to outlaw the poll tax was left undecided. Nothing in this argument provides any reason to believe that Congress intended to prevent voters from using the Voting Rights Act to vindicate their own rights under § 10. Here, as elsewhere, the RPV's argument proves too much. It would suggest that the Attorney General's similar discretion to bring § 2 and § 5 lawsuits likewise precludes private rights of action under those sections. Yet if anything is settled law, it is that private parties may bring actions to enforce those sections. *See, e.g. Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994); *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Primary enforcement of the Voting Rights Act has always been vested in private parties.

IV. This Case Is Not Moot

The RPV asserts that this case is moot because the convention has now occurred, and there is no further controversy. Since the Party and its local affiliates collected considerably more than $500,000 in such fees, including $45 from appellant Morse, it is not entirely surprising that they now proclaim that the game is over and everyone should go home. At the most basic level, this case cannot be moot as long as the Party retains the fee it collected from appellant

Morse. The complaint explicitly sought an order requiring the Party to refund the fee, *see* Complaint, Requested Relief ¶ 9, and the retention of that fee remains in controversy.[5]

The Party also, and remarkably, suggests that appellants' request for permanent injunctive relief is moot because "[i]n the future the Party could abolish the fee, increase it, decrease it, *or make it waivable as suggested by the Law Students*." Motion to Dismiss at 20 (emphasis added). The Party asserts that it has consistently imposed *some* fee at its conventions, has repeatedly raised the fee, and will continue to impose such a fee. *See* Affidavit of David S. Johnson, Executive Director of the RPV ¶¶ 11, 20. *Any* change -- abolishing, increasing, decreasing, or waiving the fee -- requires preclearance. *See Hampton County*, 470 U.S. at 180.

The RPV's argument makes clear that this case falls squarely within this Court's long-standing doctrine that cases challenging electoral practices and procedures are not rendered moot by the occurrence of an individual election or nomination, because they are "capable of repetition, yet evading review .... [as long as] the laws in question remain on the books," *Dunn*, 405 U.S. at 333 n. 2 (internal quotations omitted). *See also, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983); *Storer v. Brown*, 415 U.S. 727, 737 n. 8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5 (1973). Ad hoc rules are "peculiarly" subject to

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[5] In any event, even if this Court were to conclude that this case is moot despite the Party's collection and retention of an illegally imposed fee, the proper course is not to affirm the judgment below, leaving a clearly erroneous precedent on the books. Instead, the judgment of the court below should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See, e.g., Harris v. City of Birmingham*, 112 S.Ct. 2986 (1992).

this problem because of "the very speed" with which they are announced and conducted. *Montano v. Lefkowitz*, 575 F.2d 378, 382 (2d Cir. 1978) (Friendly, J.). The RPV suggests that this case could have been litigated from complaint to final disposition by this Court if only appellants had filed their complaint on December 16, 1993, the very day the RPV issued its call for a convention. Motion at 20. That claim is factually ridiculous, as even a brief consideration of this Court's schedule shows. The RPV's suggestion is also legally irrelevant. Appellants' complaint alleged a series of statutory and constitutional violations by the RPV and another defendant over the course of the campaign. Appellants brought their lawsuit in a timely fashion, after reasonable and necessary investigation. Contrary to the RPV's contention, the justiciability of appellants' claims does not depend on the date on which its convention was called.

CONCLUSION

The district court seriously erred in interpreting §§ 5 and 10 of the Voting Rights Act, and its judgment must be reversed.

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No. 94-203

In the Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, ET AL., APPELLANTS

v.

OLIVER NORTH FOR UNITED STATES SENATE COMMITTEE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the decision of a political party to require voters to pay a fee to participate in the party's convention for nominating a candidate for the United States Senate is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973c.

2. Whether a voter may bring a private action under the anti-poll-tax provision of the Act, 42 U.S.C. 1973h.

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OCTOBER TERM, 1994

No. 94-203

FORTIS MORSE, ET AL., APPELLANTS

v.

OLIVER NORTH FOR UNITED STATES SENATE COMMITTEE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case involves the decision of the Republican Party of Virginia to select its 1994 nominee for the United States Senate at a convention open only to voters who paid a $35 or $45 fee. Appellants are three individuals registered to vote in Virginia. They contend that the Party's decision to require the fee violated the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973 *et seq.*, in two ways: (1) the Party did not obtain preclearance for the fee, as required by Section 5 of the Act, 42 U.S.C. 1973c; and (2) the fee violates the anti-poll-tax

provision in Section 10 of the Act, 42 U.S.C. 1973h. A three-judge court dismissed appellants' claims under Section 5 and Section 10 for failure to state a claim for which relief could be granted.[1]

1. Virginia law authorizes a political party to place its nominee for the United States Senate on the general election ballot if the party received at least 10% of the vote in any contest in either of the two preceding statewide elections. Virginia law also authorizes a party to select its senatorial nominee by a primary election or other means. Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993).

The Republican Party of Virginia (the Party) has used a variety of means to select its senatorial nominees. See David S. Johnson Aff. (Johnson Aff.) ¶ 3, attached as an addendum to the Republican Party of Virginia's Mem. of Law Opposing Pls.' Mot. for a Prelim. Injunction. In 1964, for example, the Party's senatorial nominee was selected by its State Central Committee. In most later election years, however, the Party chose its senatorial nominee at a convention. See Mot. to Affirm or Dismiss 3 n.1; Johnson Aff. ¶¶ 13, 15. In 1990, which was the senatorial election year immediately preceding the one at issue in this case, the Party decided to select its nominee at a primary election, but the election was cancelled because no one challenged the Party's

[1] In this posture, the allegations in appellants' complaint must be taken as true, *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977), and the dismissal of their claims under Section 5 and Section 10 of the Act cannot be upheld "unless it appears beyond doubt that the [appellants] can prove no set of facts in support of [those] claim[s] which would entitle [them] to relief," *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See also, *e.g.*, *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) (reviewing dismissal of equal protection claim on appeal).

incumbent. See Johnson Aff. ¶ 14. The Party has never sought judicial or administrative preclearance of changes in its nominating process under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Compl. ¶ 47.

For the 1994 senatorial election, the Party decided to select its nominee at a convention to be held on June 3, 1994. Compl. ¶ 12; see Johnson Aff. ¶ 16. According to the Party's Plan of Organization, delegates to such a convention are to be selected at local "mass meetings," which are open to anyone registered to vote in Virginia who supports the Party's principles and is willing to declare his or her support for the Party's nominee. Johnson Aff. ¶¶ 4-5. Although the Plan provides for the convention delegates to be "elect[ed]" at these mass meetings, *id.* at ¶ 5, in practice any qualified voter who wants to be a delegate and shows up at a mass meeting is chosen as a delegate. Compl. ¶ 14; see Mot. to Affirm or Dismiss 2.

A person cannot, however, attend the Party's convention merely because he or she has been selected as a delegate. Instead, the delegate must also pay a nonrefundable fee to the Party. The amount of the fee has increased over the years. For the 1994 convention, the fee was $35 or $45, depending on the locality from which the delegate was selected. Compl. ¶ 16; see Johnson Aff. ¶ 11. Appellants allege that the Party's practice of charging the fee was not in effect on November 1, 1964 (the date with reference to which changes in voting practices are determined under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c). Compl. ¶ 11. Nonetheless, the Party has never sought preclearance of the fee under Section 5 of the Act. Compl. ¶¶ 46-47.

2. Appellants are registered voters in Virginia who wanted to attend the Party's 1994 convention. Appellants Kenneth Bartholomew and Kimberly Enderson

were deterred from attending by the fee requirement. Appellant Fortis Morse learned of the fee requirement when he went to the headquarters of the Albemarle County Republican Party in February, 1994, to register as a delegate. Because Morse did not have enough money in his bank account to pay the $45 fee, he asked a party official whether it could be waived. The official said no. Morse borrowed the money from a friend and was permitted to register as a delegate only after paying the fee. Compl. ¶¶ 4-6, 17-25, 35-39.

While at the Party's county headquarters, Morse met an official of the Oliver North for United States Senate Committee (North Committee). The North Committee official gave Morse $45 to repay his friend when Morse indicated that he would support North at the convention. Morse repaid both his friend and the North Committee. The Party has retained Morse's $45. Compl. ¶¶ 26-33.

3. On May 2, 1994, appellants filed their five-count complaint in this action in the United States District Court for the Western District of Virginia. Counts 1 and 2 charged that the fee violated the Twenty-Fourth and Fourteenth Amendments to the Constitution. Compl. ¶¶ 41-44. Counts 3 and 4 alleged that the fee violated Section 5 of the Act, 42 U.S.C. 1973c, because it was not precleared, and Section 10 of the Act, 42 U.S.C. 1973h, because it was a poll tax. Compl. ¶¶ 45-49. Count 5 charged that the North Committee violated the anti-vote-buying provision of the Act, Section 11(c) (42 U.S.C. 1973i(c)). Compl. ¶¶ 50-51. The complaint sought, among other relief, preliminary and permanent injunctions preventing the Party from imposing the fee and ordering it to return Morse's $45. Compl. 6-7.

A three-judge court was convened to consider appellants' claims under Section 5 and Section 10 of the Act. See 42 U.S.C. 1973c, 1973h(c); 28 U.S.C. 2284(a).

After expedited briefing and a hearing, the court granted appellees' motion to dismiss those claims. J.S. App. A2-A14.[2]

With regard to appellants' Section 5 claim, the court recognized that political parties are subject to Section 5 "to the extent they are empowered by the State to conduct primary elections for purposes of selecting national convention delegates." J.S. App. A8. But the court held that Section 5 never applies to "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting." *Ibid.* The court believed that this holding was supported by the regulation of the Attorney General that cites a change in party rules for primary elections as one example of a change that is covered by Section 5. J.S. App. A9-A10 (discussing 28 C.F.R. 51.7). The court also relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). In *Williams*, the district court held that Section 5 did not cover a party's decision to change its method of selecting delegates to a national convention from a system under which they were appointed to a system under which they were chosen in open convention. See J.S. App. A10. The court in this case concluded that, because the fee at issue here was imposed in connection with a convention, rather

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[2] The three-judge court remanded appellants' Section 11 claim and their constitutional claims to a single-judge district court. Appellants voluntarily dismissed the Section 11 claim and asked the single-judge court to postpone consideration of the constitutional claims. J.S. 6 n.6. The only claims before this Court are the claims in Counts 3 and 4, arising under Section 5 and Section 10 of the Act.

than a primary, the Section 5 challenge to the fee had to be dismissed. J.S. App. A10-A11.

In dismissing appellants' Section 10 claim, the court held that actions under Section 10, the anti-poll-tax provision of the Act, may be brought only by the Attorney General, and not by a voter subject to a poll tax. J.S. App. A11-A12. The court based that holding on the fact that Section 10 of the Voting Rights Act does not expressly authorize private actions. *Id.* at A12. The court recognized that in *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that Section 5 of the Act is enforceable by private actions, even though it, like Section 10, does not expressly authorize them. J.S. App. 12. The court observed, however, that Section 10 differs from Section 5, because Section 10 expressly authorizes enforcement actions by the Attorney General. J.S. App. A12.

DISCUSSION

This case presents two important questions concerning the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973 *et seq.* The first question concerns the extent to which Section 5 of the Act applies to political parties. Although this Court has never addressed that issue, the Court has made it clear that Section 5 applies not only to state and local governments but to "all entities having power over any aspect of the electoral process within designated jurisdictions." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 118 (1978). Consistent with that understanding, the Attorney General has interpreted Section 5 to cover the activities of political parties if those activities involve a "public electoral function," affect "voting" within the meaning of the Act, and are carried out under state authority. 28 C.F.R. 51.7. In our view, the Party's decision to impose the fee at issue here fits within the Attorney General's criteria and therefore is subject to the preclearance requirement of Section 5. The three-judge court in the present case, however, relied on this Court's summary affirmance in *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972), to hold that Section 5 applies to a political party only when it selects a nominee in a primary election, but not when it selects a nominee at a convention. Because that holding is incorrect and fosters circumvention of the remedial scheme that Congress sought to provide under the Act, plenary review is warranted.

The second question is whether an action under Section 10, the anti-poll-tax provision of the Act, may be brought by a voter who is subject to such a tax, or instead may be brought only by the Attorney General. That important question, like the first question presented, has never been addressed by this Court. In *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), however, this Court held that private actions may be brought under Section 5 of the Act, even though Section 5 does not expressly authorize such actions. The three-judge court's holding that private actions may *not* be brought under Section 10 cannot be reconciled with *Allen*. That holding, like the court's holding on Section 5, warrants plenary review.[3]

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[3] Contrary to appellees' contention (Mot. to Affirm or Dismiss 19-21), this case is not moot, because appellant Morse has a continuing, concrete interest in recovering his $45, see *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978), and because the questions presented here are capable of repetition, yet evading review. See Opp. to Mot. to Affirm or Dismiss 8-10.

1. a. Section 5 of the Voting Rights Act prohibits certain jurisdictions, including Virginia, from changing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" until the change has been precleared by either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c.[4] The preclearance requirement applies only to changes that have a "direct relation to, or impact on, voting." *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 830 (1992). The term "voting" is defined broadly under the Act, 42 U.S.C. 1973*l*(c)(1):

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Moreover, Section 5 is "expansive within its sphere of operation." *Presley*, 112 S. Ct. at 828. "[A]ll changes in voting must be precleared" (*ibid.*), even if they are "minor," and without regard to whether they have a racially discriminatory purpose or effect. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566, 570 (1969).

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[4] To obtain preclearance, a covered jurisdiction must demonstrate "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. 1973c.

This Court has made clear that a voting change can be covered by Section 5 even if the change is not made by a governmental unit. Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 118 (1978). In that respect, the Court has explained, Section 5 is "like the constitutional provisions it is designed to implement"—the Fourteenth and Fifteenth Amendments. *Ibid.* The Court has held that those Amendments govern political party activities that are "part of the machinery for choosing [government] officials." *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944); see also *Terry* v. *Adams*, 345 U.S. 461 (1953).

In accordance with this Court's decisions, the Attorney General has interpreted Section 5 to apply to "[c]ertain activities of political parties." 28 C.F.R. 51.7. A regulation of the Attorney General adopted in 1981 states in relevant part (*ibid.*):

> A change affecting voting effected by a political party is subject to the preclearance requirement [of Section 5]: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction * * *.

The regulation further states that, "[f]or example," Section 5 applies to "[c]hanges with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen." *Ibid.*[5] Under the regulation, the Attorney

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[5] The regulation also provides examples of party activities that "are not subject to the preclearance requirement" of Section 5,

General has precleared numerous proposed changes in party rules and on some occasions objected to such changes. See, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 97th Cong., 1st Sess. Pt. 3, at 2246, 2265 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General, to Rep. Edwards, listing objections filed under Section 5, including ones filed against political parties).

The lower federal courts have held that changes in party rules affecting who chooses a party's nominee are subject to preclearance under Section 5. For example, in *Fortune* v. *Kings County Democratic Comm.*, 598 F. Supp. 761 (E.D.N.Y. 1984), a three-judge district court held that Section 5 applied to a change by the Kings County Democratic Party affecting the voting membership of its executive committee. The court reasoned that the executive committee performed "public electoral function[s]" by "filling vacancies in nominations * * * and * * * authorizing nonparty members to run as Democrats." *Id.* at 765. Because the change in the committee's membership affected the constitution of the body that exercised those functions, the court held it subject to preclearance.[6]

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including "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms." 28 C.F.R. 51.7.

[6] See also *Hawthorne* v. *Baker*, 750 F. Supp. 1090, 1094-1097 (M.D. Ala. 1990) (Section 5 applied to changes in the way political party selected members of its state, and certain county, executive committees), vacated as moot, 499 U.S. 933 (1991); *MacGuire* v. *Amos*, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court) (per curiam) (Section 5 applied to changes in rules governing selection of delegates to Democratic and Republican parties' national conventions); cf. *Wilson* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 1299, 1302-1303 (M.D.N.C. 1970) (three-judge court) (Section 5 applied to "Rotation Agreement" that limited county from which party's state senatorial candidate could be selected).

b. The decision of the Republican Party of Virginia to charge a fee to delegates wishing to attend the Party's 1994 senatorial convention falls within Section 5, as interpreted by this Court, the Attorney General (whose interpretation is entitled to "considerable deference," *Presley*, 112 S. Ct. at 831), and lower courts in other cases. Because the court below, in reaching a contrary conclusion, relied on the Attorney General's regulation, see J.S. App. A9-A10, we focus here on the manner in which that regulation applies to the Party's decision to impose the fee.

First, the Party's imposition of the fee clearly relates to its performance of a "public electoral function": selecting a nominee for public office whose name will be placed on the general election ballot. 28 C.F.R. 51.7. That selection process is a "part of the machinery for choosing [government] officials," *Smith* v. *Allwright*, 321 U.S. at 664, whether it occurs at a convention or at a primary election. Cf. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) ("[T]he form of a change in voting procedures cannot determine whether it is within the scope of § 5.").

In addition, imposition of the fee "affect[s] voting." 28 C.F.R. 51.7. It does so by affecting the selection of the candidates to be placed on the ballot at the general election. This Court has long recognized that changes in the procedures by which candidates gain positions on the general election ballot affect voting by controlling the choices that voters make at the general election. See *Presley*, 112 S. Ct. at 828. In *Allen*, for example, the Court held that Section 5 applied to changes that made it

more difficult for independent candidates to petition for a place on the general election ballot. See 393 U.S. at 551, 570. The Court reasoned that such changes affected voting because they "might * * * undermine the effectiveness of voters who wish to elect independent candidates." *Id.* at 570.[7] See also *Hampton County Election Comm'n*, 470 U.S. at 174-181 (Section 5 applied to change in length of time between candidate filing period and election); *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 37-43 & n.10 (1978) (school board rule requiring candidates for office to take unpaid leave affected voting because it "tends to deny some voters the opportunity to vote for a candidate of their choosing").

Finally, in imposing the fee and thereafter increasing it, the Party is "acting under authority explicitly * * * granted by" Virginia to select a senatorial nominee for inclusion on the general election ballot. 28 C.F.R. 51.7(b); see Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993).

c. The three-judge court in this case relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). J.S. App. A10. *Williams*, however, provides little support for the district court's holding.

In *Williams*, the district court held that Section 5 did not apply to a party's decision to change its method of

[7] Justice Harlan agreed that these changes affected voting, and were therefore covered by Section 5, even though he took a different view of the scope of Section 5 than the majority. He reasoned that "[s]ince the Voting Rights Act explicitly covers 'primary' elections, see § 14(c)(1) [42 U.S.C. 1973*l*(c)(1)]," and since the petition procedure for independent candidates was "the functional equivalent of the political primary," there was "no good reason why it should not be included within the ambit of the Act." *Allen*, 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part).

selecting delegates to the party's national convention from an appointment system to a system under which delegates were chosen in open convention. The district court was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard." *Williams*, slip op. 4 (copy lodged with the Court). The court nonetheless held that the party's change in the delegate election process was not subject to Section 5 because the court believed that the Act provided "no way for the State Party to gain the required federal approval." *Id.* at 5.

That belief is no longer accurate, if it ever was. After *Williams*, the Attorney General amended the regulations implementing Section 5 expressly to allow a political party to obtain preclearance for a covered change in voting. 28 C.F.R. 51.23. That amendment calls into question the correctness of the district court's reliance on *Williams*. At the very least, it warrants plenary review by this Court to clarify the significance of the Court's summary affirmance in *Williams*.

d. The district court's holding invites circumvention of Section 5's preclearance requirement. Under the court's holding, a political party in a covered jurisdiction may avoid the preclearance requirement merely by selecting its nominees in a convention rather than a primary election. Although the initial change from a primary to a convention process would have to be precleared, see *Presley*, 112 S. Ct. at 828, once the process is in place, the district court's decision would allow the party to adopt any kind of exclusion, no matter how invidious, without having to preclear it. A party could, for example, even adopt a rule excluding black voters from serving as voting delegates to its convention. "The only recourse for the minority group members affected by such changes would be the one

Congress implicitly found to be unsatisfactory: repeated litigation." *Board of Comm'rs*, 435 U.S. at 125.

e. In defense of the district court's holding on Section 5, appellees advance three grounds upon which the court itself did not rely. None of appellees' contentions is persuasive.

i. Appellees contend that the application of Section 5 to the Party's decision to impose the fee violates the First Amendment, as incorporated in the Fourteenth Amendment. Mot. to Affirm or Dismiss 10, citing *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). This Court rejected a strikingly similar argument in *Smith* v. *Allwright*, *supra*.

In *Allwright*, black voters argued that a rule of the Texas Democratic Party barring them from voting in the party's primary election violated the Fourteenth and Fifteenth Amendments. The party "defended [the rule] on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary." *Allwright*, 321 U.S. at 657.

This Court rejected that defense. It held that, because the party's primary election was "a part of the machinery for choosing officials," *Allwright*, 321 U.S. at 664, the party's rule excluding blacks from voting in the election was subject to the Fifteenth Amendment. See *id.* at 664-665. In *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court relied on *Allwright* to declare unconstitutional an unofficial "pre-primary" election held by the

Jaybird Democratic Association of Texas from which black voters were excluded.

Allwright and *Terry* make it clear that when, as here, a political party performs a public electoral function, its freedom of association interests do not prevail over the requirements of the Fifteenth Amendment. Nor do they negate the Voting Rights Act, which was enacted under Congress's "remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966).

ii. Appellees contend that, even if a party's rules are subject to Section 5 when they involve a "public electoral function," it is impossible to fashion a "workable" standard for distinguishing those rules from party rules that relate solely to the internal deliberations of the party. Mot. to Affirm or Dismiss 7. That contention is flawed in two ways. First, although it may be difficult in some cases to determine whether a party rule relates to a public electoral function, that is no reason to hold that all such rules fall outside the scope of Section 5, any more than it is a reason to hold that all such rules are free from scrutiny under the Fifteenth Amendment. Cf. *Smith* v. *Allwright*, *supra*; *Terry* v. *Adams*, *supra*. Second, it has not in fact proven impossible to fashion a workable standard in this area. The Attorney General's regulation (28 C.F.R. 51.7) provides such a standard. See pp. 9-12, *supra*. The Attorney General has applied the regulation for more than a decade. Appellees do not claim that application of the regulation has interfered with the operation of political parties. See Mot. to Affirm or Dismiss 5-8.

iii. Finally, appellees err in asserting that this case is analogous to *Presley*. Mot. to Affirm or Dismiss 6-7. In *Presley*, this Court held that Section 5 did not apply to

the resolution of a county commission that changed the allocation of authority among individual commissioners. 112 S. Ct. at 829-830. Appellees argue that "[i]f Section 5 cannot reach the internal operations of an elected body, there is no reasonable construction of its terms that will support its reaching the internal deliberations of a private body, particularly the decisions of a political party as to who may attend its convention." Mot. to Affirm or Dismiss 7. Such decisions, however, do not relate solely to a party's "internal deliberations," any more than do a party's decisions regarding who may vote in its primary election. Instead, such decisions are directly connected to a party's performance of a public electoral function. Thus, *Presley* is not controlling.[8]

2. The three-judge court in this case held that private parties cannot avail themselves of the remedies against poll taxes in Section 10 of the Act. J.S. App. A11-A12. The court based that holding on the fact that (1) Section 10 does not expressly authorize private actions; and (2) Section 10 *does* expressly authorize actions by the Attorney General. The court's holding is at odds with this Court's decision in *Allen*. For that reason, and because private actions can play a significant role in the enforcement of Section 10, plenary review is warranted.

In *Allen*, the Court held that private parties may obtain declaratory and injunctive relief against changes in voting that have not been precleared as required by

[8] See *Henderson* v. *Graddick*, 641 F. Supp. 1192, 1195, 1201 (M.D. Ala. 1986) (three-judge court) (Section 5 applies to party's decision to change from open to closed primary); see also, *e.g.*, the Attorney General's preclearance decisions regarding similar changes in: Green Party of Alaska (June 25, 1992); Democratic Party of Alaska (Feb. 28, 1992); Republican Party of Alaska (May 21, 1991); and Republican Party of Alaska (Sept. 18, 1990).

Section 5. 393 U.S. at 555. The Court recognized that "[t]he Voting Rights Act does not explicitly grant * * * private parties" authority to enforce Section 5. *Id.* at 554. The Court found implicit authority for private enforcement, however, in the language of Section 5, analyzed "in light of the major purpose of the Act." *Id.* at 555. The Court reasoned that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557. Accordingly, the Court determined that "the specific references" in Section 12 of the Act, 42 U.S.C. 1973j, to actions by the Attorney General to enforce Section 5 "were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights," and not to bar private enforcement actions. *Id.* at 555 n.18.[9]

Allen strongly supports the conclusion that private parties may seek judicial enforcement of Section 10. Section 10 explicitly recognizes the right of each citizen to be free from unconstitutional poll taxes. 42 U.S.C. 1973h(a). That right likewise "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Allen*, 393 U.S. at 557. Accordingly, the provision in Section 10 authorizing enforcement of Section 10 by the Attorney

[9] Section 2 of the Act, 42 U.S.C. 1973, like Section 5, does not expressly authorize private enforcement actions, and it is expressly enforceable by the Attorney General under Section 12. Although this Court has not explicitly addressed whether Section 2 authorizes private enforcement actions, it has repeatedly entertained such actions. See, *e.g.*, *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994).

General should be construed as giving her power to enforce "what might otherwise be viewed as 'private' rights," *Allen*, 393 U.S. at 555 n.18, and should not be construed to bar private enforcement of Section 10.

In defending the district court's contrary holding, appellees observe that Section 10 does not create a substantive right to be free from poll taxes but instead merely provides a remedy for enforcing the proscription against poll taxes in the Twenty-Fourth Amendment. Mot. to Affirm or Dismiss 16-17. That observation, while true, is beside the point. The Court in *Allen* rejected as irrelevant the argument that Section 5 did not create a substantive right but merely provided a remedy for violations of the Fifteenth Amendment (393 U.S. at 556 n.20):

> Appellees argue that § 5 * * * gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant.

Similarly, the fact that Section 10 does not confer any new right on individual voters—but only creates a remedy for violations of the Twenty-Fourth Amendment—does not answer the question whether individual voters may avail themselves of that remedy.

This Court should note probable jurisdiction to resolve the availability of private remedies under Section 10, a question that is important to the effective enforcement of the Section. The Court should, consistently with

Allen, hold that Section 10 is enforceable by private actions.[10]

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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JANUARY 1995

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[10] Appellees defend the dismissal of the Section 10 claim on the alternative ground, not addressed by the three-judge court, that the Party's fee requirement is not a "poll tax." Appellees appear to argue that the remedy set forth in Section 10 is narrowly limited to the historic definition of a poll tax: "a head tax imposed by the state." Mot. to Affirm or Dismiss 18; see *United States* v. *Texas*, 252 F. Supp. 234, 238 (W.D. Tex.) (three-judge court), summarily aff'd, 384 U.S. 155 (1966). That argument is refuted by the broad language of Section 10, which authorizes relief "against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, *or substitute therefor*." 42 U.S.C. 1973h(b) (emphasis added). We believe that appellants' allegations describe a "poll tax * * * or substitute therefor" within the meaning of Section 10.

No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF OCCASIONED BY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF OCCASIONED BY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Appellees, The Republican Party of Virginia and The Albemarle County Republican Committee (collectively, "the Party") submit this supplemental brief, pursuant to Rule 18.9 of the Rules of the United States Supreme Court, in response to the Brief of the United States as Amicus Curiae.

INTRODUCTION

Rather than present the Court with an examination of the important constitutional and administrative ramifications posed by the Appellants' (collectively, the "Law Students") expansive interpretation of the Voting Rights Act, 42 U.S.C. § 1973c (the "Act"), the United States merely adopts and repeats their arguments and analysis to such an extent that it may as well have placed a grey cover on the Law Students' brief. Not only is the Government's brief free of original analysis, but it is even unwilling to part company with the Law Students when they propose a private cause of action to challenge alleged poll taxes under Section 10 of the Voting Rights Act. This Court recognized such a right under the Fourteenth Amendment almost 30 years ago in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). What possible benefit could flow from a forced reading of Section 10 to create a duplicate remedy before a three judge court? There is no sign that the Government has independently evaluated this or other serious policy implications of the position advanced by the Law Students.

The position taken by the Government on the question of preclearance is even more radical. The Act by its terms applies to "voting," and "voting" is defined as "all action necessary to make a vote effective in any primary, special or general election . . ." 42 U.S.C. § 1973l(c)(1). There is a good reason why the sweep of the Act should fall short of party conventions. Whenever states have tried to regulate conventions they have been brought up short by the First Amendment.

The Government articulates no reason why the First Amendment should operate differently on acts of Congress. It is one thing for a party litigant in an adversarial process to minimize the constitutional infirmities of their position, but it is disappointing that an amicus would simply deny that serious constitutional issues are implicated.

Similarly, it is difficult to understand how an amicus can simply deny that grave issues of "workability" arise from the Law Students' position. If the Law Students are correct that an increased fee requires preclearance, then does this not prove too much? Would not every change in location of a mass meeting or a change in rules governing procedure require preclearance? The Government has not hazarded whether it has the resources to preclear such matters from Virginia's 136 cities and counties. The Republican Party of Virginia knows that neither it nor its local volunteers possess such resources.

Due to the great similarity between the United States' brief and that of the Law Students, including the authorities cited, organization and the arguments advanced, the Party will not burden the Court with fully restating its points and authorities as described in its Motion to Affirm or Dismiss. The Party does offer for the Court's further consideration the questions of constitutional liberty, policy and practicality not pursued by the amicus.

DISCUSSION

I. THE UNITED STATES FAILS TO ADDRESS THE CONSTITUTIONAL AND ADMINISTRATIVE IMPLICATIONS POSED BY INTRUDING INTO THE FUNDAMENTAL RIGHTS OF FREE POLITICAL ASSOCIATION IMPLICIT IN THE CONSTRUCTION OF THE ACT ADVANCED BY THE LAW STUDENTS.

The United States argues that the Voting Rights Act must extend to the selection of convention delegates by the Party, because otherwise, "political parties" might be able to engage in some hypothetical act of racial discrimination in the indeterminate future. There is, of course, no hint or even suggestion that this case involves racial discrimination. Indeed, in an effort to exalt metaphor over fact, the Law Students have argued in their brief that the convention was so inclusive that it became a de facto primary. J.S. at 3. In the face of such an open and widely attended convention, the United States' profession of abstract and hypothetical fears does not warrant disregarding the plain language of the Act and all applicable case authority or justify intrusion into the internal rule-making decisions of a political party with the very real constitutional questions and administrative burdens posed by such action.

As this Court aptly pointed out in *Presley v. Etowah County Com.*, 502 U.S. 491, 112 S.Ct. 820, 832 (1992), the "Voting Rights Act is not an all-purpose anti-discrimination statute." Section 5 of the Act was specifically designed to protect against certain evils.

The Act precludes any change in "voting qualification or prerequisite to voting, or standard, practice or procedure" aimed at "denying citizens their right to vote because of their race." *Presley*, 112 S.Ct. at 827. In apparent recognition of the First Amendment's guaranties, Congress specifically limited the Act by defining "voting" in terms of an election. The Voting Rights Act specifically defines "voting" to include ". . . all actions necessary to make a vote effective in any primary, special or general *election* . . ." 42 U.S.C. § 1973p (emphasis added). The Party's rule requiring a filing fee for delegates to its convention simply and obviously does not affect a citizen's right to vote in an election. As the Court has explained, Section 5 "is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Id.* at 832. Thus, the court below correctly held that the Party's registration fee did not trigger Section 5 of the Act.

The Court's decisions concerning the right of association guaranteed by the First and Fourteenth Amendments to participants in political parties further confirms the limited reach of the Act into the affairs of a political party. The Court has upheld the right of political parties to establish the rules governing their proceedings. *Tashjian v. Republican Party*, 479 U.S. 208, 216 (1986); *Cousins v. Wigoda*, 419 U.S. 477 (1975). The Court has also consistently struck down any attempt by a State to regulate the internal affairs of a political party. *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981); *see Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 227 (1989) (State may not prevent parties from

taking internal steps affecting their own process for selection of candidates). The Court ruled in *O'Brien v. Brown*, 409 U.S. 1 (1972) (per curiam), that the right of association protected by the First Amendment prevents the government from regulating the selection of convention delegates.

The United States simply glosses over the constitutional implications of its position by leaping to the conclusion that the Party was performing a "public electoral function," thereby subjecting its freedom of association interests to the requirements of the Fifteenth Amendment. Br. for the U.S. as Am. Cu. at 14-15. The United States reasons that the Party's delegate filing fee implicated the "public electoral function" because it is part of the "selection process [which] is a 'part of the machinery for choosing [government] officials' whether it occurs at a convention or at a primary election." Br. for the U.S. as Am. Cu. at 11 (citations omitted).

It is true that Section 5 of the Act applies to a political party to which the State has delegated authority to make rules for the conduct of primary elections. *See e.g. MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972). The theory underlying this extension of Section 5 is that no State should be permitted to bypass the requirements of the Act by delegating its authority to a political party. Id. A political party, however, is not the creature of the State, and the freedom of association guaranteed by the First and Fourteenth Amendments includes political parties.

Under amicus' analysis, every action taken by a political party not expressly limited to platform drafting would satisfy the "public electoral function" because it could "affect" for whom a citizen ultimately gets to vote. Amicus not only fails to offer a principled basis for distinguishing between a rule requiring preclearance of the fee at issue and a requirement to preclear a party's internal rules and procedures in general,[1] it assumes that a wholesale intrusion by the government into the details of party governance presents no substantial constitutional issue.

Of course, if the Attorney General of one party were to delay the nominating convention of the other party for 60 days while passing on its associated fees and rules, an absurdity of constitutional dimensions would result. One very real difficulty in the United States' position is the fact that final approval of a convention's rules does not occur until after it has been convened and has adopted its permanent rules. Under the United States' premise, the convention would have

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[1] The Government tacitly acknowledges that it "may be difficult in some cases to determine whether a party rule relates to a public electoral function ..." However, it provides no rational basis for doing so, because there is none. Br. for the U.S. as Am. Cu. at 15. The Government merely states that the difficulty in fashioning a line of demarcation from those rules that implicate the electoral function and those that do not, "is no reason to hold such rules are free from scrutiny..." *Id.* What the Government fails to acknowledge is once the Act is construed as regulating any internal rule of a political association, all rules are implicated. Neither the language of the Act nor sound policy support this result.

to come to a halt for at least 60 days, while preapproval was sought and obtained for any rule change. *See* 42 U.S.C. § 1973c. It is precisely to avoid constitutional infirmity that the Act restricts itself to state action. Here no such state action can be found.

Amicus, however, argues that the Party "is 'acting under authority explicitly . . . granted by' Virginia," as required by 28 C.F.R. 51.7(b), because §§ 24.2-101 and 24.2-509(A) Va. Code Ann. provide that parties are free to choose how they will nominate their candidates. If a law purporting to alter party rules governing candidate selection would be unconstitutional, as it certainly would be, *see Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989), then a statute recognizing the right of the party to set its own rules is hardly a delegation of a state power or function.

The statutes upon which the Solicitor General relies are simply declarative of what would be the law in the absence of the statute. The ordinary and natural reading of them is that Virginia acknowledges the Party's autonomy rather than that Virginia delegates any power. Accord, Letter of James S. Gilmore, III to Drew S. Days, III. (Attachment).

Finally, this Court has clearly stated that it will not adopt unworkable voting rights procedures. *Presley*, 112 S.Ct. at 830 (recognizing necessity to "formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting"). If the fee at issue here is

deemed to affect voting so as to require preclearance, why not the time, place and manner of conducting a mass meeting or convention in each of Virginia's localities?

The United States has provided no basis for concluding that the Justice Department is adequately equipped to handle the overwhelming burden which would be placed upon it should it have to preclear party rules. What is known is that grass roots volunteers who attend mass meetings in Virginia's fire stations, auditoriums and hotel meeting rooms are in no position to preclear anything and that the Party, as a volunteer entity, cannot undertake such effort across the Commonwealth even if preclearance were conceptually possible for all convention rules.

II. SECTION 10 OF THE VOTING RIGHTS ACT DOES NOT SUPPORT A PRIVATE RIGHT OF ACTION.

The United States has adopted wholeheartedly the Law Students' mistaken premise that one of the purposes of the Act under Section 10 was to outlaw poll taxes. It then leaps to the conclusion that the Court's decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), which established a private right of action under Section 5 of the Act, compels the conclusion that a private right of action also exists under Section 10 of the Act. The United States, as do the Law Students, completely overlooks the plain, and explicitly limited, language of Section 10. That section provides only for the Attorney General to exercise her

discretion in attacking *certain* poll taxes which have since been swept away en masse.

The obvious fallacy of the United States' position is exposed by its statement that "the provision in Section 10 authorizing enforcement of Section 10 by the Attorney General should be construed as giving her power to enforce 'what might otherwise be viewed as 'private' rights.'" Br. for the United States As Amicus Curiae at 17-18 (quoting *Allen*, 393 U.S. at 555 n.18). As the Party pointed out in its Motion to Affirm or Dismiss at 16-17, the Court in *Harper, supra*, held, after the Act was enacted, that there existed a private cause of action, outside of the Act, for poll tax violations.

Since persons already have a private right of action for poll tax violations, the entire ameliorative effect of the Act under the United States' construction of Section 10 is to merely provide a claim before a three judge court, with the associated right of direct appeal to this Court, in addition to the already existing right to pursue a private cause of action under the Fourteenth Amendment before a federal district judge with review in the Circuit Court of Appeals. There is simply no reason advanced by anyone to disregard ordinary rules of statutory construction to arrive at an unneeded remedy for a practice that was abolished more than a generation ago. Such metaphysical disputes may hone the faculties of the Law Students but present no substantial issues for this Court's review.

CONCLUSION

Given that the concerns expressed by the amicus are wholly speculative and abstract, and that the burdens and dangers associated with its position are immediate and concrete, there is no reason why the Court should depart from the plain meaning of the Act which limits its coverage to voting in elections. The Court should, therefore, summarily affirm the well-reasoned decision of the three-judge district court or dismiss the appeal.

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(6)

No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLEMEW, AND KIMBERLY J. ENDERSON,
Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
Appellees.

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED JUNE 8, 1994
PROBABLE JURISDICTION NOTED JANUARY 23, 1995

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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

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U.S. District Court
Western District of Virginia (Charlottesville)

CIVIL DOCKET FOR CASE #: 94-CV-25

5/2/94 1 COMPLAINT Filing Fee $120.00 Receipt # 61169 Service due 8/30/94 for Albemarle County, for Republican Party of, for Oliver North For (jt) [Entry date 05/05/94]

5/4/94 3 Letter from Judge James H. Michael, Jr. requesting a three judge panel of Chief Judge Sam J. Ervin, III (hw) [Entry date 05/06/94]

5/9/94 4 ORDER, Designating a Three-Judge Court, Honorable H. Emory Widener, Jr., Honorable James R. Spencer, Honorable James H. Michael, Jr. (Order signed by Chief Judge Sam J. Ervin, III on 5/4/94) (jt)

5/11/94 7 ORDER, set Memorandum deadline to 5/16/94, set Oral Argument for 2:00 5/18/94, bankruptcy courtroom, 210 Church St, SW 2nd Floor of Commonwealth of Virginia Building, Roanoke, Virginia (signed by H. Emory Widener, Jr. on 5/10/94) (jt) [Edit date 05/12/94]

5/13/94 8 ANSWER to Complaint by Republican Party Of, Albemarle County (Attorney Daniel A. Carrell, Donald W. Lemons), (jt) [Edit date 05/16/94]

5/13/94 9 MOTION to Dismiss by Republican Party Of, Albemarle County (jt) [Entry date 05/16/94]

5/16/94 10 MOTION to Dismiss by Oliver North For U.S. Senate Committee, Inc. (Attorney Donald Wise Huffman, Frederick Wilson Chockley) (lc)

5/18/94 — COURT HEARING: (Judges Widener, Michael, and Spencer; OCR Jo Myer) Parties present w/by

counsel before 3/-Judge Panel for hearing on various motions as reflected in the record. Pltfs.' mtn. for Pamela S. Karlan to be admitted pro hac vice addressed and granted. Oral motion by counsel for Oliver North for admission pro hac vice of E. Mark Braden – granted. Order entered. Arguments as to motions. Ct. adjourned for panel to make decision. Ct. resumes w/panel tendering memorandum opinion and order to Clerk for filing. Ct. reads order into record. Ct. adj. (eh) [Entry date 5/19/94]

5/18/94 17 MEMORANDUM OPINION (eh) [Entry date 5/19/94]

5/18/94 19 MOTION to Dismiss by Republican Party Of Albemarle County (jt) [Entry date 5/20/94]

5/18/94 20 ANSWER to Complaint by Republican Party, Albemarle County (jt) [Entry date 5/20/94]

5/18/94 21 AFFIDAVIT of David S. Johnson, Executive Director of the Republican Party of Virginia (jt) [Entry date 5/20/94]

6/8/94 22 Notice of Appeal to Supreme Court (hw) [Entry date 06/09/94]

6/8/94 23 NOTICE of Dismissal of Count 5 of the Complaint by Fortis Morse, Kenneth Curtis Bartholomew, Kimberly J. Enderson (hw) [Entry date 06/09/94]

6/8/94 24 MOTION to Continue Consideration on Counts 1 and 2 by Fortis Morse, Kenneth Curtis Bartholomew, Kimberly J. Enderson (hw) [Entry date 06/09/94]

6/8/94 — MEMORANDUM for Fortis Morse, Kenneth Curtis Bartholomew, Kimberly J. Enderson in support of [24-1] motion to Continue Consideration by Kimberly J. Enderson, Kenneth Curtis Bartholomew, Fortis Morse, [23-1] notice by

Kimberly J. Enderson, Kenneth Curtis Bartholomew, Fortis Morse (hw) [Entry date 06/09/94]

6/14/94 26 TRANSCRIPT of court hearing for dates of 5/18/94 (jt)

10/19/94 27 ORDER granting [24-1] motion to Continue Consideration (signed by Judge James H. Michael) (jt)

1/27/95 28 ORDER, that probable jurisdiction is noted by Supreme Court of the U.S. on 1/23/95 (jt)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

[Caption Omitted]
COMPLAINT

Introduction

1. This action challenges the imposition of a $45 fee on registered voters who wish to participate in the nomination process leading to the selection of the Republican candidate for United States Senator from Virginia. Plaintiffs seek declaratory and injunctive relief prohibiting the state Republican Party and its local affiliates from conditioning participation in the process on payment of any registration fee. They also seek declaratory and injunctive relief prohibiting the Oliver North for U.S. Senate Committee, Inc. from paying or offering to pay the fees for any voter who wishes to participate in the senatorial nomination process if that voter indicates a commitment to support Oliver North's nomination.

Jurisdiction

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. §§ 1973h(c) and 1973j(f). This is an action arising under the statutes and Constitution of the United States and an action to enforce statutes and constitutional provisions that protect civil rights, including the right to vote.

3. Plaintiffs seek declaratory and other appropriate relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

Parties

4. Plaintiff Fortis Morse is an adult citizen of the United States who resides in Albemarle County, Virginia. He is properly registered to vote.

5. Plaintiff Kenneth Curtis Bartholomew is an adult citizen of the United States who resides in Albemarle County, Virginia. He is properly registered to vote.

6. Plaintiff Kimberly J. Enderson is an adult citizen of the United States and a resident of Hampton, Virginia. She is properly registered to vote.

7. Defendant Oliver North for U.S. Senate Committee, Inc. (hereafter "North Committee") is a corporation incorporated under the laws of Virginia. It serves as the official campaign organization for Oliver North, a candidate for the Republican nomination for United States Senator from Virginia.

8. Defendant Republican Party of Virginia is an unincorporated association organized under the laws of Virginia. It is a political party within the definition of Va. Code §§ 24.2-101, 24.2-508, and 24.2-509 and, as such, it nominates candidates for United States Senator from Virginia. For this purpose it conducts a State Convention.

9. Defendant Albemarle County Republican Committee is an unincorporated association organized under the laws of Virginia. It is responsible for collecting the registration fees imposed by defendant Republican Party and certifying individual voters as delegates and alternates to the State Convention.

Background

10. Virginia has a long history of purposeful official restriction of the right to vote, including, but not limited to, imposition of poll taxes and other economic barriers to full political participation.

11. On information and belief, on November 1, 1964, the Republican Party of Virginia did not impose or collect any fee for participation in the party's nomination process for United States Senator.

Allegations of Fact

12. On December 16, 1993, Patrick M. McSweeney, Chairman of the Republican Party of Virginia, issued a Call for a State Convention for Friday, June 3, 1994, for the purpose of nominating a Republican candidate for the office of the United States Senator.

13. Qualified voters may participate in this process by becoming delegates to the State Convention. Delegates are elected in county or city mass meetings, conventions, or party canvasses, and they cast votes at the Convention.

14. As a practical matter, any voter who wishes to qualify as a delgate and participate in the State Convention can do so.

15. As a practical matter, delegates are not bound to support a particular candidate at the State Convention.

16. Local political committees certify qualified voters as delegates upon payment of a registration fee by the voter of $35.00 or $45.00 depending upon the date of certification.

17. Fortis Morse is a registered voter in Albemarle County, Virginia, and intends to support James Miller, a

candidate for the Republican nomination for United States Senator.

18. Morse is chairman of the Law and Graduate Republicans at the University of Virginia, and has been politically active on behalf of numerous Republican candidates for national, state, and local office.

19. Morse is a full-time first-year student at the University of Virginia School of Law and on the morning of February 28, 1994, had $30.00 in his checking account.

20. Payment of a $45.00 fee to participate in the Republican State Convention would impose a financial hardship on Morse.

21. On February 28, 1994, Morse went to Albemarle County Republican Headquarters to register as a delegate.

22. Morse asked for a county Pre-File Form. The form indicated a non-refundable filing fee of $45.00.

23. Morse asked Rose Wade, a party worker, whether he could register as a delegate without paying the fee because he lacked the funds.

24. Wade told Morse that the fee was mandatory but that if Morse told her for whom he was going to vote, it would be different because some candidates supplied money to sponsor voters who supported them.

25. Later that afternoon, Morse returned to the Headquarters with $50.00 he had borrowed. Wade accepted Morse's form and payment.

26. Morse then indicated that he was reluctant to owe the $45.00 to the friend from whom he had borrowed it and

asked Wade whom he should see, if he supported Oliver North, a rival candidate for the senatorial nomination.

27. Wade identified John Pudner, who was standing in the room.

28. Pudner asked Morse to step out into the hallway, where he introduced Morse to a man whom Pudner identified as the North for Senate County Coordinator.

29. The coordinator asked Morse whether he was supporting Oliver North. Morse did not reply, but simply smiled.

30. The coordinator then handed Morse $50.00 and Morse handed him $5.00 in return.

31. The coordinator then wrote Morse's name on a list he was carrying and stated that if Morse did not come to the meeting "we'll hunt you down," indicating that this meant he expected Morse to be at the state convention.

32. Morse subsequently repaid the $45.00 to the North Committee.

33. The Committee cashed his check, which was memo endorsed "Repayment for Delegate fee — John Pudner."

34. On information and belief, volunteers and staff workers connected with the North Committee have offered to pay or reimburse the registration fees of other qualified voters who undertake to support North.

35. Kenneth Curtis Bartholomew is a registered voter in Albemarle County, Virginia, and a supporter of James Miller, a candidate for the Republican nomination for United States Senator.

36. Bartholomew would have filed as a delegate to support Miller but for the imposition of the $45.00 filing fee.

37. Enderson is a registered voter in Hampton, Virginia.

38. Enderson is vice-chairman of the Law and Graduate Republicans at the University of Virginia. She has worked on Republican campaigns for state and national campaigns.

39. Enderson intended to file as a delegate from Hampton, but was deterred from filing when she learned that she would have to pay a filing fee.

40. Many qualified voters have been deterred from participating in the senatorial nomination process by the imposition of a filing fee.

First Cause of Action

41. Plaintiffs reallege the contents of paragraphs 1-40.

42. The Republican Party of Virginia's imposition of a filing fee for participation at the State Convention violates the Twenty-Fourth Amendment to the Constitution of the United States.

Second Cause of Action

43. Plaintiffs reallege the contents of paragraphs 1-40.

44. The Republican Party of Virginia's imposition of a filing fee for participation at the State Convention violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Third Cause of Action

45. Plaintiffs reallege the contents of paragraphs 1-40.

46. The Republican Party of Virginia's imposition of a filing fee for full participation in the processes leading to the nomination of a candidate for United States Senate involves a voting qualification or prerequisite to voting, or standard, practice, or prodedure with respect to voting different from that in force or effect on November 1, 1964.

47. Because the Republican Party of Virginia has not obtained preclearance of this procedure, its use violates Section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c.

Fourth Cause of Action

48. Plaintiffs reallege the contents of paragraphs 1-40.

49. The Republican Party of Virginia's imposition of a filing fee for full participation in the processes leading to the nomination of a candidate for United States Senate violates Section 10 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973h(a), in that it precludes people of limited means from voting or imposes unreasonable financial hardship upon such persons.

Fifth Cause of Action

50. Plaintiffs reallege the contents of paragraphs 1-40.

51. The North Committee's practice of paying or offering to pay the registration fees for voters who wish to participate in the senatorial nomination process if they indicate a

commitment to support candidate Oliver North violates Section 11 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973i(c).

Relief

WHEREFORE, plaintiffs ask that this Court set this matter for a speedy hearing, following which it will enter orders providing relief as follows:

1. Notify the Chief Judge of the Fourth Circuit, pursuant to 28 U.S.C. § 2284, that a three-judge court should be convened, pursuant to 42 U.S.C. §§ 1973c or 1973h(c), to determine whether an injunction should issue against defendant Republican Party of Virginia enjoining its imposition of a filing fee for full participation in the processes leading to the nomination of a candidate for United States Senate unless and until the practice receives preclearance under Section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c.

2. Issue a preliminary injunction enjoining the Republican Party from conditioning participation in the June 3, 1994, State Convention upon payment of any registration fee.

3. Issue a preliminary injunction requiring the Republican Party to reopen the qualifying period for delegates to permit voters to register as delegates without payment of any filing fee, up to and including June 1, 1994.

4. Issue a preliminary injunction enjoining the North Committee from paying or offering to pay the registration fees for voters who wish to participate in the senatorial nomination process if they indicate a commitment to support candidate Oliver North.

5. Issue a declaratory judgment declaring that the filing fee violates the Fourteenth and Twenty-Fourth

Amendments to the Constitution of the United States and Section 10 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973h.

6. Issue a declaratory judgment declaring that the North Committee's practice of paying or offering to pay the registration fees for voters who wish to participate in the senatorial nomination process if they indicate a commitment to support candidate Oliver North violates Section 11 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973i.

7. Permanently enjoin the Republican Party and its local affiliates from conditioning participation in any state convention upon payment of any registration fee.

8. Permanently enjoin the North Committee from paying or offering to pay the registration fees for voters who wish to participate in the senatorial nomination process if they indicate a commitment to support candidate Oliver North

9. Order the Republican Party of Virginia or the Albemarle County Republican Committee to refund to Fortis Morse the $45.00 filing fee the Party and Committee collected from him.

10. Award plaintiffs their costs incurred in this case, together with reasonable attorney's fees, pursuant to 42 U.S.C. §§ 1973l(e) and 1988.

11. Grant such addition and further relief as the Court finds just.

Date: May 2, 1994

Respectfully submitted,

_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

[Caption Omitted]

ANSWER OF DEFENDANTS
REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE
COUNTY REPUBLICAN COMMITTEE

Defendant, the Republican Party of Virginia and its local affiliate, the Albemarle County Republican Committee (together referred to as "RPV"), by counsel, pursuant to this Court's Order of May 10, 1994, to file a responsive pleading on or before May 13, 1994, and subject to RPV's Motion to Dismiss, filed herewith, answers the Complaint of Plaintiffs as follows:

1. RPV admits that Plaintiffs purport to seek declaratory and injunctive relief by virtue of their challenge of the imposition of the $45 fee, as asserted in paragraph 1 of the Complaint, but RPV denies that Plaintiffs are entitled to any such relief from the state party or its local committees, including defendant Albemarle County Republican Committee (the "Albemarle Committee"). Insofar as the allegations of paragraph 1 relate to defendant Oliver North for U.S. Senate Committee, Inc. (the "North Committee"), RPV admits that Plaintiffs purport to seek declaratory and injunctive relief but otherwise is without knowledge or information sufficient to form a belief as to the truth of such allegations.

2. RPV admits that this Court has subject matter jurisdiction over the Complaint.

3. RPV admits that Plaintiffs purport to seek relief under the Declaratory Judgment Act, but denies that any such relief is due.

4. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 of the Complaint.

5. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 of the Complaint.

6. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6 of the Complaint.

7. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the Complaint.

8. RPV admits the allegations of paragraph 8 of the Complaint except that RPV denies that the state party is organized under the laws of Virginia. As a political association it derives its existence independent of those laws.

9. RPV admits that the Albemarle Committee is an unincorporated association, but denies that it is organized under the laws of Virginia. As a political association, it derives its existence independent of those laws. RPV denies the remaining allegations of paragraph 9. RPV further states, however, that the Albemarle Committee is responsible for collecting certain convention registration fees imposed by RPV and that the Albemarle Committee selects, through one of the methods permitted under RPV rules, certain delegates and alternates to the party's State Convention. The local committee does not merely certify individual voters as delegates and alternates.

10. RPV denies the allegations of paragraph 10 of the Complaint. RPV was not a party to the conduct alleged, and any "purposeful official restriction of the right to vote" by the Commonwealth of Virginia has long since been repealed or otherwise rendered invalid.

11. RPV admits the precise allegations of paragraph 11 of the Complaint, for on November 1, 1964, no nomination process of RPV was in progress. RPV further states, however, that it has traditionally and necessarily charged registration fees

for its state conventions in order to cover their substantial costs. It charged a registration fee, for example, for the June 1964 State Convention, the agenda for which included the party's nomination of its candidate for the United States Senate.

12. RPV admits the allegations of paragraph 12 of the Complaint.

13. RPV admits the allegations of paragraph 13.

14. RPV denies the allegations of paragraph 14.

15. RPV admits the allegations of paragraph 15.

16. RPV admits that the local committees ultimately certify their delegates to the State Convention, but otherwise denies the allegations of paragraph 16. As alleged in paragraph 13 of the Complaint, delegates are selected at the city or county level, not merely certified upon the payment of a registration fee. The local party committees do collect registration fees, both for the State Convention and the local convention, mass meeting, or canvass. The Albemarle Committee collected a fee of $45 for delegates to the 1994 State Convention, of which $10 was a fee imposed by the Albemarle Committee.

17. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18. RPV further states, however, that its records reveal that plaintiff Morse was a delegate to the 1993 Republican State Convention and has been certified as a delegate to the 1994 State Convention.

19. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19.

20. RPV denies the allegations of paragraph 20.

21. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

22. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22.

23. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 23.

24. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 24.

25. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25.

26. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26.

27. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27.

28. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28.

29. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29.

30. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30.

31. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31.

32. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32.

33. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33.

34. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34.

35. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35.

36. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 36.

37. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37.

38. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38.

39. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 39.

40. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40.

41. In response to paragraph 41 of the Complaint, RPV repeats and incorporates its answers to paragraphs 1 through 40.

42. RPV denies the allegations of paragraph 42 of the Complaint.

43. In response to paragraph 43 of the Complaint, RPV repeats and incorporates its answers to paragraphs 1 through 40.

44. RPV denies the allegations of paragraph 44 of the Complaint.

45. In response to paragraph 45 of the Complaint, RPV repeats and incorporates its answers to paragraphs 1 through 40.

46. RPV denies the allegations of paragraph 46 of the Complaint.

47. RPV admits that it has not obtained preclearance of its registration fee, for it is not required to do so. RPV

otherwise denies the allegations of paragraph 47 of the Complaint.

48. In response to paragraph 48 of the Complaint, RPV repeats and incorporates its answers to paragraphs 1 through 40.

49. RPV denies the allegations of paragraph 49 of the Complaint.

50. In response to paragraph 50 of the Complaint, RPV repeats and incorporates its answers to paragraphs 1 through 40.

51. RPV is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 51 of the Complaint.

52. In response to the requests for relief numbered 1 through 11, on pages 6 and 7 of the Complaint, RPV denies that Plaintiffs are entitled to the relief requested or anyrelief whatsoever.

First Affirmative Defense

53. The Complaint fails in whole and in part to state a claim upon which relief can be granted.

Second Affirmative Defense

54. If the Complaint states such a claim statutorily, granting the relief requested would be in violation of the First Amendment to the Constitution of the United States, including a prior restraint on the freedom of association.

Third Affirmative Defense

55. Plaintiffs lack standing to bring their Complaint, for they have pled no actionable injury.

Fourth Affirmative Defense

56. To the extent they seek preliminary injunctive relief, Plaintiffs are barred by the doctrine of laches.

WHEREFORE, RPV requests this Court to dismiss the Complaint with prejudice, or, in the alternative, to enter judgment in its behalf; and to award reasonable attorneys' fees and costs to RPV and grant it such other relief as may be proper.

Dated: May 13, 1994

REPUBLICAN PARTY OF VIRGINIA
ALBEMARLE COUNTY REPUBLICAN COMMITTEE

By: _____
General Counsel
Republican Party of Virginia
J. Robert Brame, III
(Virginia State Bar No. 05276)
James Center
901 E. Cary Street
Richmond, VA 23219

[Names and addresses of other counsel omitted in printing]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

MOTION TO DISMISS
OF DEFENDANTS REPUBLICAN PARTY OF VIRGINIA
AND
ALBEMARLE COUNTY REPUBLICAN COMMITTEE

Defendants, the Republican Party of Virginia and its local affiliate, the Albemarle County Republican Committee (together referred to as "RPV"), by counsel, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this Court to dismiss the Complaint as to RPV on the ground that it fails to state a claim upon which relief can be granted against RPV.

In support of this motion, RPV relies on the Complaint and the memorandum to be submitted in support hereof.

Dated: May 13, 1994
REPUBLICAN PARTY OF VIRGINIA
ALBEMARLE COUNTY REPUBLICAN COMMITTEE

By: _____
General Counsel
Republican Party of Virginia
J. Robert Brame, III
(Virginia State Bar No. 05276)
James Center
901 E. Cary Street
Richmond, VA 23219

[Names and addresses of other counsel omitted in printing]

[CERTIFICATE OF SERVICE OMITTED IN FRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA,
AT CHARLOTTESVILLE

[Caption Omitted]

AFFIDAVIT

COMES NOW David S. Johnson, and after being sworn, deposes and says:

1. I am Executive Director of the Republican Party of Virginia, an unincorporated voluntary association which operates pursuant to a Plan of Organization ("Plan"), a copy of which is attached hereto as Exhibit A.

2. I make this affidavit on the basis of my own personal knowledge and by researching files of the Republican Party of Virginia maintained in the ordinary course of its business.

3. Pursuant to its practice and the Plan, the Republican Party of Virginia chooses and has chosen its representatives to Federal elections by primary, convention, caucus or by vote of the governing committee of the appropriate unit (*e.g.*, State Central Committee for state-wide offices; Congressional District Committee for Representatives).

4. The basic unit of organization of the Republican Party of Virginia is the mass meeting, which is open to qualified participants:

> All legal and qualified voters under the laws of he Commonwealth of Virginia, regardless of race, religion, national origin, or sex, who are in accord with the principles of the Republican Party, and who, if requested express in open meeting either orally or in writing as may be required their intent to support all of its nominees for public office in the ensuing election may participate as members of the Republican Party of Virginia in its mass meetings, party canvasses, conventions, or primaries encompassing their respective election districts.

(Exhibit A, Article 1, Section A[1]).

5. Participants at mass meetings elect chairmen and members of the local committees (*e.g.*, county or city), delegates to state, Congressional district and legislative district conventions and conduct other Party business. Alternatively, local committees may elect to use canvass or unit conventions to perform these same functions.

6. Pursuant to the Plan, the time, location, participant qualifications and other essential facts must be voted by the respective committees and published in a newspaper of general circulation at least seven days prior to a mass meeting. This statement of the times and conditions of a meeting is termed the "Call."

7. Delegates to the State Convention elect the Party Chairman and National Committee persons, adopt resolutions and a platform outlining the philosophy of the Republican Party of Virginia, and adopt or revise the rules under which the Republican Party of Virginia and its subsidiary unit committees must operate.

8. Payment of the filing fee does not in and of itself make one a delegate to the State Convention. Under the State Party Plan of Organization, delegates to the State Convention must be elected by their unit's mass meeting, canvass or convention. The unit mass meeting, canvass or convention also has the authority to "slate" applicants out of election to the District or State conventions or instruct the entire delegation to these conventions to vote for a particular candidate or position, regardless of the individual delegates' personal preferences. *See* Exhibit A, State Party Plan of Organization, Art. VIII, Section H4. In addition, persons wishing to be delegates can be required to take a written oath to support all Republican candidates for office in the ensuing general election.

9. The rules actually governing the State Convention are those formally adopted by the delegates participating in the Convention after it is called to order.

10. In addition to the nomination of candidates for office, the Republican Party of Virginia conducts other business at its conventions, such as, but not limited to, a) the election of a State Party Chairman, b) adoption of resolutions or platforms outlining the philosophy of the grassroots members of the Republican Party of Virginia, and c) the adoption and/or revision of the rules under which the Republican Party of Virginia and its subsidiary district and unit committees must operate.

11. The expenses of the 1993 Party Convention were approximately $373,373. The Party finances the convention expenses with delegate filing fees. With respect to the state conventions, state filing fees have been required for as far back as our records go, including 1964, and the amounts have gradually increased over the years to $35.

12. During the past 30 years, participation in Virginia Republican state conventions has increased dramatically, going from approximately 550 certified as delegates in 1964 to 14,614 in 1994.

13. The State Central Committee of the Republican Party of Virginia selected the convention process to select its United States Senate nominee in 1964 (meeting at the John Marshall Hotel in Richmond); 1966 (Hotel Roanoke); 1970 (John Marshall, Richmond); 1972 (Roanoke Civic Center); 1976 (Scope, Norfolk); 1978 (Richmond Coliseum); 1982 (Richmond Coliseum); 1984 (Hampton Coliseum); 1988 (Roanoke Civic Center).

14. In 1990, the State Central Committee voted to choose its U.S. Senate candidate by primary, but the primary was canceled when the incumbent was not challenged for nomination.

15. In 1964 and 1978, the Party chose its U.S. Senate candidate by a vote of its State Central Committee. It scheduled

selection of its U.S. Senatorial candidate at its 1964 convention, but the delegates were unwilling to choose a nominee to challenge Senator Harry F. Byrd, Sr.

16. On December 4, 1993, the State Central Committee of the Party approved the Call for the 1994 State Convention. Pursuant to the Plan, Patrick McSweeney, Republican Party of Virginia Chairman, distributed the Call to local committees in December, 1993, and published the Call in the approved newspaper on or about May 2, 1994 ("State Call"). A true copy of the State Call is attached as Exhibit B.

17.The Call for the Mass Meeting of the Republican Party of Virginia, County of Albemarle, was published on or about February 17, 1994, scheduling the mass meeting for March 5, 1994. It recited the requirement, *inter alia*, of a non-refundable $45 filing fee for delegates to the State Convention, a $10 filing fee for delegates to the Fifth Congressional District, and a $10 filing fee for delegates to the Seventh District. The Call further provided, "There shall be no registration fee charged at the Mass Meeting of the Republican Party of Albemarle County." At the Mass Meeting of the Republican Party for Albemarle County, the attendees elected delegates to the State and Congressional Conventions.

18. To my knowledge, none of the plaintiffs to this action have inquired of the Republican Party of Virginia concerning the status of fees, if any, for convention delegates in 1994, nor have they protested the fees charged for the 1994 State Convention.

19. In fact, I am aware of only one inquiry in recent years from persons who wanted to participate as delegates but could not pay the fee. In March 1994, I was advised that a student at VPI and the student's spouse wanted to participate as delegates to the State Convention but could not afford the filing fees. Without knowing or inquiring as to their candidate preference, we arranged for their fees to be paid by private contributions. I am unaware of any other persons who notified

the Republican Party of Virginia that they might be excluded from participation as delegates because of fees.

20. As participation in the Party has increased, the number of places were the Party's convention could be held has decreased. Both the convention's size and closing of facilities have necessitated regular changes in locations, in addition to the traditional practice of rotating conventions between the Eastern and Central parts of the state.

/s/
David S. Johnson

[JURAT OMITTED IN PRINTING]

Exhibit A

REPUBLICAN PARTY OF

VIRGINIA

Patrick McSweeney, Chairman
J. Robert Brame, III, General Counsel
David Johnson, Executive Director

Plan of Organization

115 East Grace Street
Richmond, Virginia 23219
804/780-0111
FAX 804/343/1060

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ADOPTED February 12, 1972
AMENDED March 23, 1972
February 24, 1973
April 26, 1975
March 27, 1976
June 29, 1979
September 15, 1979
September 27, 1980
RESTATED June 1, 1985
AMENDED June 14, 1986
April 28, 1990
July 28, 1990
June 8, 1991
May 20, 1992

ARTICLE I
Participation in Party Actions

SECTION A. Qualifications

1. All legal and qualified voters under the laws of the Commonwealth of Virginia, regardless of race, religion, national origin or sex, who are in accord with the principles of the Republican Party, and who, if requested, express in open meeting either orally or in writing as may be required their intent to support all of its nominees for public office in the ensuing election may participate as members of the Republican Party of Virginia in its mass meetings, party canvasses, conventions, or primaries encompassing their respective election districts.

2. A person who has made application for registration and meets all other requirements of Section A, but whose name does not appear on the local registration books solely because of the books having been closed in connection with a local election, will nevertheless be deemed a legal and qualified voter.

SECTION B. Participation

All Chairmen and members of Official Committees, delegates to Conventions, and voters in Mass Meetings or Party Canvasses provided for in the State Party Plan shall be members of the Republican Party of Virginia as stated in this Article and must be legally qualified voters of the respective Units or election Districts which they represent as Chairmen, members, delegates or voters.

ARTICLE II
Definitions

1. "State Party" or "Party" means Republican Party of Virginia.

2. "State Party Plan" means Plan of Organization of the Republican Party of Virginia.

3. "State Central Committee" means State Central Committee of the Republican Party of Virginia.

4. "Election District" means the City, County, ward of a City, magisterial district of a County, precinct or portions or combinations of such political subdivisions which comprise the area defined by law in which an election is to be held.

5. "Congressional District" means the Election District for a member of the House of Representatives of the United States Congress.

6. "District" means Congressional District unless otherwise designated.

7. "Legislative District" means the Election District for a member of the House of Delegates or the State Senate of the Virginia General Assembly.

8. "District Committee" means Republican Congressional District Committee for each Congressional District.

9. "Legislative District Committee" means Republican District Committee for each State Senatorial District and each House of Delegates District as the context may require.

10. "County Committee" means County Committee for the Republican Party for each county.

11. "City Committee" means City Committee for the Republican Party for each city.

12. "Unit" means County or City.

13. "Unit Committee" means County Committee or City Committee.

14. "Republican Party Voting Strength" means a uniform ratio of the votes cast in a political subdivision for the Republican candidates for Governor and President to the total votes cast in the entire Election District for the Republican candidates for Governor and President in the last preceding Gubernatorial and Presidential elections.

15. "Quadrennial State Conventions" means the State Convention held in Presidential election years for the purposes of nominating electors-at-large to the Electoral College and electing delegates-at-large and alternates-at-large to the Quadrennial national Republican Convention.

16. "Quadrennial District Conventions" means the District Convention held in Presidential election years for the purposes of nominating an elector to the Electoral College and electing Delegates and Alternates to the Quadrennial National Republican Convention.

17. "Biennial District Convention" means the District Convention held in Congressional election years and is the same as the Quadrennial District Convention in Presidential election years.

18. "Official Committees" are the State Central Committee, each District Committee, each Legislative District Committee, and each Unit Committee.

19. "Chairman","Chairmen", "he", and "his", shall not be construed to denote gender.

20. "Ex-Officio" means the person holding the office and shall not be construed to mean with or without a vote.

21. "Mass Meeting" is as defined in the then current edition of Robert's Rules of Order subject to the provisions of the State Party Plan.

22. "Party Canvass" is a method of electing chairmen and members of Official Committees, delegates to Conventions, or Party nominees which shall include prefiling candidacies, then secret balloting by Party members at convenient polling places and hours after proper notice.

23. "Convention" is as defined in the then current edition of Robert's Rules of Order subject to the provisions of the State Party Plan.

24. "Primary" is as defined in and subject to the Election Laws of the Commonwealth of Virginia.

Definitions not set forth above, to the extent found therein and where not otherwise inconsistent with Article VII, Section H and Article VIII, Section 1.3 of the State Party Plan, shall be those set forth in the then current edition of Robert's Rules of Order.

ARTICLE III
State Central Committee

Section A. Membership
The membership of the State Central Committee shall consist of the following:

1. State Chairman

2. First Vice Chairman

3. Two (2) Vice Chairmen from the Eastern part of the State.

4. Two (2) Vice Chairmen from the Western part of the State.

5. Two (2) National Committee members.

6. President, ex officio, and two (2) elected representatives of the Virginia Federation of Republican Women.

7. President, ex officio, and two (2) elected representatives of the Young Republican Federation of Virginia.

8. President, ex officio, and two (2) elected representatives of the College Republican Federation of Virginia.

9. District Chairman of each District, ex officio.

10. Three members from each District.

11. One (1) additional member from each District that cast its plurality vote for the Republican Presidential nominee in the last preceding Presidential election.

12. One (1) additional member for each District represented by a Republican member of Congress.

13. Four (4) Republican members of the General Assembly.

14. State Treasurer and Finance Chairman.

15. State Secretary, Budget Director, and General Counsel, but they shall not be entitled to vote.

16. All publicly elected present and former Republican statewide office-holders, but they shall not be entitled to vote.

SECTION B. Election and Term
1. The State Chairman shall be elected by the Quadrennial State Convention for a term of four (4) years or until his successor is elected.

2. The Vice Chairman shall be elected by the State Central Committee at the first meeting following the Quadrennial State Convention for a term of four (4) years or until their successors

are elected. The Eastern portion of the State shall include the 1st, 2nd, 3rd, 8th, 10th, and 11th Congressional Districts, and the Western portion of the State shall include the 4th, 5th, 6th, 7th, and 9th Congressional Districts..

3. The National Committee Members shall be nominated by the Quadrennial State Convention.

4. District Members.

a. The regular members representing a District shall be elected by the Quadrennial District Convention for a term of four (4) years or until their successors are elected.

b. The additional member for each District that cast its plurality vote for the Republican Presidential nominee in the last preceding Presidential election shall be elected by the District Committee at the first meeting following the Presidential election and shall serve concurrently with the Presidential term.

c. The additional member for each District represented by a Republican member of Congress shall be elected by the District Committee at the first meeting following the Congressman's election and shall serve concurrently with the Congressman's term.

5. The members representing the General Assembly shall be elected by the Republican Members of the General Assembly at the beginning of each even year session of the General Assembly, for a term of two (2) years or until their successors are elected.

6. The State Secretary and State Treasurer shall be elected by the State Central Committee at the first meeting following the Quadrennial State Convention to serve at the pleasure of the Committee.

7. The State Finance Chairman, Budget Director, and General Counsel shall be appointed by the State Chairman to serve at the pleasure of the Chairman.

8. A person shall occupy only one voting membership on the State Central Committee at any one time.

SECTION C. Vacancies

1. A vacancy in the office of State Chairman shall be filled by the State Central Committee until the next regular State Convention, which shall then elect a State Chairman to fill the remaining unexpired portion of the term of the vacating State Chairman.

2. A vacancy in the office of Vice Chairman, State Secretary or State Treasurer shall be filled by the State Central Committee.

3. A vacancy in the office of a National Committee member shall be filled by the State Central Committee until the next regular State Convention which shall then elect a successor National Committee member to fill the remaining unexpired portion of the vacating member's term.

4. Vacancies in the District memberships of the State Central Committee shall be filled by the applicable District Committee; however, any vacancy not so filled within ninety (90) days may be filled by the State Central Committee.

5. Vacancies shall be filled after notice of such intent, has been included in the call of the meeting at which the vacancy is to be filled.

SECTION D. Duties

1. State Central Committee

a. The State Central Committee shall formulate and provide for the execution of such policies, plans, and measures

as it may deem conducive to the best interest of the Party and in conformity with the State Party Plan.

b. It shall determine whether candidates for statewide public office shall be nominated by Convention or Primary.

c. It shall call all regular and special State Conventions and make arrangements therefor, including the basis of representation, the time, and the place.

d. It shall have general supervision of all statewide campaigns. Neither the State Party nor the State Central Committee, however, shall be responsible for the financing of, or any financial obligations resulting from, such campaign, except to the extent that any such obligations may be approved and assumed in writing, in advance, by the State Central Committee.

e. It shall prescribe such additional duties of the State officers and shall appoint special State Central subcommittees as it deems appropriate.

f. Whenever the State Central Committee shall determine that a District or a Legislative District Chairman has failed to function as such, then the State Chairman shall appoint a new Chairman to perform the duties provided in the State Party Plan until a successor is duly elected by the applicable Committee.

2. State Chairman

a. The State Chairman shall be Chairman of the State Central Committee and of its Executive Committee.

b. See Article III, Section E, Paragraph 1, Executive Committee.

c. He shall issue calls for State Conventions and shall preside until a temporary organization is effected.

d. He shall convene the State Central Committee when the needs of the Party so demand, but in no event less than once during each four (4) month period and he shall preside at the meetings of the committee. He shall be responsible for sending written notice of the call for a State Central Committee meeting to all members of the Committee and to Unit Chairmen, which shall include the agenda for the meeting.

e. He shall issue, upon request, to Unit Chairmen and Unit Committeemen a commission signed by him and countersigned by the State Secretary, after notification of their elections as such.

f. He shall be responsible for the operation of State Headquarters, including hiring such personnel as he may deem necessary. He may appoint any personnel as my be required from time to time with such duties as he may prescribe. In no case shall the total salaries of the employed personnel exceed the total amount for the salaries as set out in the budget adopted by the State Central Committee.

g. He shall, acting in the name of the Party not less than ninety days prior to the end of the fiscal year, engage a firm of certified public accountants to perform an annual independent audit of the Party's financial records and affairs as of the end of the fiscal year and to report the results of such audit to the Executive Committee and to the State Central Committee.

3. First Vice Chairman

The First Vice Chairman's primary duty, until action is taken under the provisions of Article II, Section C, Paragraph 1, is to act as State Chairman when the office has been vacated by the State Chairman or during disability.

4. Vice Chairmen

The Vice Chairmen's primary duties shall be to give organizational assistance to the Official Committees in their respective portions of the State and to discharge such other duties as may be assigned by the State Chairman.

5. District Members

It shall be the affirmative duty of the District Members of the State Central Committee to cooperate with the District Chairmen and District Committees in coordinating Party activities at every level of the State organization. Membership on the State Central Committee is not an honorary, but rather a working position and each member assumes an obligation to assist in building the Party at every level and particularly within his area.

6. State Secretary

a. The State Secretary shall keep the minutes and records of the State Central Committee meetings, which shall be the property of the Committee, and he shall mail a copy of the minutes of the preceding meeting, including attendance, to all members of the State Central Committee and all Unit Chairmen within ten (10) days after the adjournment of the meeting.

b. He shall serve as the secretary of all State Conventions until a temporary organization is effected. He shall be the custodian of the record of the proceedings of each State Convention.

c. He shall keep a roster of the names and addresses of all State Central Committee members and District, Legislative District and Unit Chairmen and shall perform such other duties as the State Central Committee prescribes.

7. State Treasurer

The State Treasurer shall be the custodian of Party funds.

8. Finance Chairman

See Article III, Section E, Paragraph 2, Finance Committee.

9. Budget Director

See Article III, Section E, Paragraph 3, Budget Committee.

10. General Counsel

The General Counsel shall be a lawyer who shall advise the State Chairman and the State Central Committee on legal matters relating to Party business. He shall serve as Parliamentarian of all meetings of the State Central Committee.

SECTION E. Subcommittees

1. Executive Committee

a. There shall be an Executive Committee of the State Central Committee comprised of the State Chairman and all District Chairmen, plus the following, but they shall not be entitled to vote: The First Vice Chairman, National Committee members, President of the Virginia Federation of Republican Women, President of the Young Republican Federation of Virginia, President of the College Republican Federation of Virginia, State Treasurer, State Secretary, Finance Chairman, Budget Director, and one member of the State Senate and one member of the House of Delegates selected by the Republican members of the Virginia General Assembly who are currently serving on the State Central Committee.

b. The Executive Committee shall act for the State Central Committee when the latter is not in session and shall be subject to the direction of the State Central Committee.

c. Meetings of the Executive Committee shall be called at the pleasure of the Chairman and shall be held not less than once every three months.

2. Finance Committee

a. There shall be a State Finance Committee comprised of the State Finance Chairman, who shall be the Chairman, and one (1) member from each District, who shall be appointed by the District Chairman; however, if the District Chairman does not appoint a member, then the State Chairman with the approval of the Executive Committee shall appoint a member from that District. In addition, the State Chairman is authorized to appoint additional members to the State Finance Committee, subject to confirmation by the Executive Committee.

b. The Finance Committee shall be responsible for fund raising activities of the Party which shall be developed in coordination with the Budget Committee. Its procedures, budges, and quotas shall be subject to approval of the State Central Committee.

c. The State Finance Chairman may appoint other officers of the Finance Committee.

3. Budget Committee

a. There shall be a Budget Committee comprised of the Budget Director, who shall be the Chairman, Executive Director of the State Party, Finance Chairman, State Treasurer and three (3) persons to be appointed by the State Chairman.

b. The Budget Committee under the direction of the State Chairman shall prepare an annual budget for approval of the State Central committee and shall establish controls to assure compliance with the budget as adopted.

c. The annual budget shall include a provision for such funds as shall be required to comply with the requirements of Article III, Section D.2.g.

4. Audit Committee

a. There shall be an Audit committee comprised of not less than five persons, at least three of whom shall be experienced in business and financial matters to be appointed by the state Chairman.

b. The Audit Committee shall be responsible for the establishment and supervision of the implementation of accounting and financial systems, procedures and policies and other internal financial controls. It shall also, in cooperation with the Chairman, select a firm to conduct the annual independent audit of the Party's financial records and supervise the conduct of this audit.

ARTICLE IV

District Committees

SECTION A. Memberships

The memberships of each District Committee shall consist of the following:

1. District Chairman

2. Unit Chairman, ex officio, of each Unit wholly or partially within the District, subject to the provisions of Article VI, Section E.

3. District Representative of the Virginia Federation of Republican Women, ex officio.

4. Young Republican Federation District Committeeman, ex officio.

5. College Republican Federation District Committeeman, ex officio.

6. District members of the state Central Committee, ex officio, but their right to vote shall be determined by Article IV, Section E.

7. Vice Chairmen, a Secretary and a Treasurer may be elected by the District Committee. They may be elected members of the District Committee, but they shall not otherwise be entitled to vote solely by virtue of holding any of such offices.

SECTION B. Election and Term

1. The District Chairman shall be elected by the Biennial District Convention for a term of two (2) years or until his successor is elected.

2. The Vice Chairman, Secretary and Treasurer shall be elected by the voting members of the District Committee for a term of two (2) years at the first meeting following the Biennial District Convention.

SECTION C. Vacancies

1. A vacancy in the office of District Chairman shall be filled by the District Committee for the remaining unexpired portion of the term.

2. Vacancies in the offices of Vice Chairmen, Secretary and Treasurer shall be filled by the District Committee.

3. Vacancies shall be filled after notice of such intent has been included in the call of the meeting.

SECTION D. Duties

1. District Committee

a. The District committee shall determine whether candidates for District public office shall be nominated by Convention or Primary.

b. It shall call all regular and special District Conventions and make arrangements therefor, including the basis of representation, the time and the place.

c It shall have general supervision over all District Campaigns and shall cooperate with the State Central Committee in conducting statewide campaigns.

d. It shall assist in the raising funds within the District for National and State causes and otherwise assist the State Central Committee in other Party endeavors wherever practical.

e. Whenever the District Committee shall determine that a Unit Committee, or its Chairman, has failed to function as such, the District Committee shall appoint a new Committee, or a new Chairman, as the case may be. A Committee thus created shall perform their duties provided in the State Party Plan until their successors are elected at a Mass Meeting or Convention called for that purpose.

2. District Chairman

a. The District Chairman shall be the Chairman of the District Committee.

b. He shall issue calls for District Convention and shall preside until a temporary organization is effected. See Article VIII, Section A.

c. He shall convene the District Committee when the needs of the Party so demand, but in no event less than once during each three (3) month period, and shall preside at the meetings of the Committee. He shall be responsible for sending written notice of the call for a Committee meeting to all members of the Committee, which shall include the agenda for the meeting.

d. He shall be responsible for the operation of the District Headquarters, hiring such personnel as he shall deem necessary and for which funds are budgeted and shall be accountable therefor to the District Committee.

e. He shall be responsible for providing a prescribed time and place, which shall be supervised by the District Chairman, or a designated representative, for filing such declaration of candidacy and petitions as may be required by state law of a candidate in any primary election.

SECTION E. Voting Rights
Each Biennial District Convention may determine whether its members on the State Central Committee shall have a vote on its District Committee. Such voting privileges, once extended, shall continue until rescinded by a subsequent Biennial District Convention.

ARTICLE V
Legislative District Committee

SECTION A. Membership
1. The membership of each Legislative District Committee shall consist of the Unit Chairman of each Unit wholly or partially in the Legislative District, subject to the provisions of Article VI, Section E.

2. Each Unit Chairman's vote within the Committee shall be weighted in proportion to the Republican Party Voting Strength of his Unit within the Legislative District.

SECTION B. Election and Term
The Legislative District Chairman shall be elected by the Legislative District Committee at the meeting called to determine the method of nominating candidates for Legislative District office. The Chairman of a State Senate District Shall serve for four (4) years, and the Chairman of a House of

Delegates District shall serve for two (2) years, or until their respective successors are elected. He may be one of the Unit Chairmen, but shall not be otherwise be entitled to vote solely by virtue of holding said office.

SECTION C. Vacancies
A vacancy in the office of Legislative District Chairman shall be filled by the Legislative District Committee for the remaining unexpired portion of the term.

SECTION D. Duties
1. Legislative District Committee

a. The Legislative District Committee shall determine whether candidates for Legislative District public office shall be nominated by Mass Meeting, Party Canvass, Convention or Primary, where permitted to do so under Virginia Law.

b. It shall call all regular and special Mass Meetings, Party Canvasses and Conventions and make arrangements therefor, including the time and the place and, if a Convention, the basis of representation.

2. Legislative District Chairman

a. The Legislative District Chairman shall be the Chairman of the Legislative District Committee.

b. He shall issue Calls for Legislative District Mass Meetings, Party Canvasses, or Conventions and shall preside until a temporary organization is effected. See Article VIII, Section A.

c. He shall convene the Legislative District Committee when required and shall preside the meeting of the Committee. He shall be responsible for sending written notice of the Call for a Committee Meeting to all members of the Committee, which shall include the agenda for the meeting.

d. He shall be responsible for providing a prescribed time and place, which shall be supervised by the Legislative District Chairman, or a designated representative, for filing such declaration of candidacy and petitions as may be required by state law of a candidate in any primary election.

ARTICLE VI
County and City Committee

SECTION A. Membership
The membership of each County and City Committee shall consist of the following:

1. Unit Chairman

2. Precinct Members – the number from each Precinct shall be determined by the Unit Committee on the basis of Republican candidates' votes in a recent past election or elections, but not less than one (1) member from each Precinct.

3. At-Large Members – additional At-Large Memberships may be created which shall not exceed in number 30 percent of the members of the Committee.

4. Elected Public Officials – All publicly elected Republican officials shall be additional members of the Committee, if the Unit Committee's Bylaws so provide. They shall not be classified as At-Large Members.

5. Vice Chairmen, a Secretary and a Treasurer may be elected by the Unit Committee. They may be elected members of the Unit Committee, but they shall not otherwise be entitled to vote solely by virtue of holding any such offices.

SECTION B. Election and Term
1. The Chairman and other members of the Committee shall be elected by the Mass Meeting, Party Canvass, Convention or

Primary called for the purpose electing delegates to the Biennial District Convention for a term of two (2) years or until their successors are elected.

2. The Vice Chairmen, Secretary and Treasurer shall be elected by such procedure and for such terms as shall be fixed by the Unit Party Plan, should there be one, and otherwise as shall be determined by the Unit Committee.

SECTION C. Vacancies
1. A vacancy in the office of Unit Chairman shall be filled by the Unit Committee for the remaining unexpired portion of the term.

2. Vacancies in the office of Vice Chairman, Secretary and Treasurer shall be filled by the Unit Committee.

3. Any vacancies among other elected members of the Committee shall be filled by the Unit Committee for the remaining unexpired portion of the term.

4. Vacancies shall be filled after notice of such intent has been included in the call of the meeting.

SECTION D. Duties
1. Unit Committee

a. The Unit Committee shall determine whether candidates for local and constitutional public offices shall be nominated by Mass Meeting, Party Canvass, Convention, or Primary and whether Unit Chairman and Committee members shall be elected by Mass Meeting, Party Canvass, Convention, or Primary.

b. It shall call all regular and all special Mass Meetings, Party Canvasses, Conventions and make all arrangements therefor and, if a Convention, determine the basis of representation. Authority to make such arrangements (other

than the date, time and whether there shall be, and the requirements for, any prefiling) may, at the discretion of the Unit Committee, be delegated to the Unit Chairman.

c. It shall cooperate with the State Central Committee, its District Committee, and the Legislative District Committees within its boundaries in conducting all elections and fund raising activities.

2. Unit Chairman

a. The Unit Chairman shall be the Chairman of the Unit Committee.

b. He shall issue calls for Unit Mass Meetings, Party Canvasses, or Conventions and shall preside until a temporary organization is effected. See Article VIII, Section A.

c. He shall convene the Unit Committee when required, but in no event less than once during each three (3) month period, and shall preside at the meetings of the Committee. He shall be responsible for sending written notice of the call for a Committee meeting to all members of the Committee, which shall include the agenda for the meeting.

d. He shall be responsible for providing a prescribed time and place, which shall be supervised by the Unit Chairman, or a designated representative, for filing such declaration of candidacy and petitions as may be required by state law of a candidate in any primary election.

SECTION E. District Units

Whenever a Unit is divided between two (2) or more Congressional or Legislative Districts the Chairman of such Unit Committee shall serve as the Unit representative on the Congressional or Legislative District Committee encompassing his residence. Such Unit Chairman shall designate a person residing in that part of the unit located in each of the other

involved Congressional or Legislative Districts to serve at the pleasure of the Unit Chairman as the Unit's representative on

[Page omitted from copy of Exhibit A served on appellants' counsel]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, this _____ day of [MONTH], [YEAR].

_____

(Seal)

WITNESS:

_____

(Seal)

(*)Inclusion of the power of substitution is discretionary with the member. Its omission shall preclude substitution.

SECTION B. Notice and Quorum

Except as provided in Section F of this Article, meetings of Official Committees shall be held upon written notice, in the case of the State Central Committee, of not less than three weeks and otherwise, of not less than one week on the call of the Chairman, or on the call of one-third of the members, which call shall include the agenda for the meeting. Unless otherwise provided by a District's or Unit's Plan or Bylaws, a majority of the voting members of a Committee shall constitute a quorum for the transaction of business.

SECTION C. Removal

Any Chairman, except the State Chairman, or any other member of an Official Committee may be removed from office by total vote of two-thirds (2/3) of the other members of the Committee, after being furnished with notice that such removal will be sought, with the charges, in writing, signed by not less than one-third (1/3) of the members of the Committee; and allowing

him thirty (30) days within which to appear and defend himself. The State Chairman may be removed by a two-thirds (2/3) vote of a State Convention or by the three-fourths (3/4) vote of the State Central Committee, the action of said Convention or Committee being subject to the foregoing as to notice and opportunity for defense.

SECTION D. Absences
A member of an Official Committee other than an ex-officio member automatically loses his committee position if he is absent three (3) consecutive meetings without representation by a person holding a proxy; provided, however, that a State Central Committee member automatically loses and is deemed to have resigned his Committee position if he fails to attend in person at least fifty (50) percent of the regular meetings in any calendar year. A vacancy created by such resignation shall be filled in accordance with the State Party Plan.

SECTION E. Nominations by Committee
Whenever an Election District fails to nominate a candidate or candidate for public office, in the absence of an instruction to the contrary by the Convention or Mass Meeting, the official Committee of that Election District is authorized to nominate such candidate or candidates by two-thirds (2/3) vote of those present in a Committee meeting after notice of such intent has been included in the call of the meeting, and the nominations shall have the same force and effect as if the person or persons were nominated by a Mass Meeting, Party Canvass, Convention or Primary.

SECTION F. Filling Vacancies
Whenever candidates, electors, delegates or alternates have been duly elected by a Mass Meeting, Party Canvass, Convention, or Primary and a vacancy occurs, the applicable Official Committee is authorized to fill such vacancy in formal meeting by majority vote after due notice of such intent has been

included in the call of the meeting. such a meeting shall require at least twenty-four (24) hours notice, either written or verbal.

SECTION G. Public Meetings
All Official Committee meeting shall be held in a building appropriate for public use and shall be open to the public.

SECTION H. Rules
All Official Committee meetings shall, to the extent applicable, be governed by and conducted in accordance with, giving precedence as listed to, the following: the State Party Plan; District or Unit Plan or Bylaws; and otherwise in accordance with the then current edition of Robert's Rules of Order.

ARTICLE VIII
Mass Meetings, Party Canvasses, Conventions and Primaries

SECTION A. Call Requirements
1.All calls for State, District and Legislative District Conventions, shall be issued by the appropriate Chairman to the included Unit Chairman not less than thirty (30) days, except those calls for special elections, prior to the Convention date. Each call shall include:

a. The qualifications for membership in the Republican Party of Virginia as stated in Article I.

b. The time, place and purposes to the Convention.

c. The basis of representation to the Convention.

d. The number of Delegate votes to which all participating Election Districts are entitled.

e. The amount of the registration fee, if any.

2. All calls for Mass Meetings or Party Canvasses shall be published in a newspaper of general circulation in the Election District not less than seven (7) days, except those calls for

special elections, prior to the Mass Meeting or Party Canvass. Each call shall include:

a. The qualifications for membership in the Republican Party of Virginia as Stated in Article I.

b. The time, place and purposes of the Mass Meeting or Party Canvass.

c. In the event a purpose is to elect Delegates to a Convention, the time, place, purpose of, and the basis of representation to the Convention.

d. The amount of registration fee, if any.

3. In order to be a requirement for any election by a Mass Meeting, Party Canvass, or Convention, prefiling shall be approved by the appropriate Official Committee and the prefiling requirement included in the call. The call, including the prefiling requirement, must then be published in a newspaper of general circulation in the Election District at least seven (7) days prior to the prefiling deadline. This publication requirement shall take precedence over the publication requirement of Article VIII, Section A.2. Each person desiring to prefile must file a statement prior to the deadline for prefiling. The Official Committee or its Chairman, if authorized, may prescribe the use of a particular filing form for the required statement

4. It is the responsibility of the applicable Chairman to use the most effective means available, including news media, to adequately publicize Mass Meetings, Party Canvasses, or Conventions with the purpose of encouraging maximum citizen involvement. This publicity shall include the method of Delegate selection.

5. In the event that a published call for any Mass Meeting, Party Canvass or Convention shall differ in any respect from the call authorized by the Official Committee, the requirements of

the published call, unless contested prior to adjournment or conclusion, shall upon adjournment or conclusion of the Mass Meeting, Party Canvass, or Convention be conclusive and not thereafter subject to contest. Participation in a Mass Meeting, Party Canvass, or Convention shall not prejudice the rights of any person signing a petition protesting the validity of such Mass Meeting, Party Canvass, or Convention.

6. A Mass Meeting or Convention may by unanimous consent dispense with the reading of the call.

SECTION B. State Conventions

A State Convention, which may be the Quadrennial State Convention, or Primary shall be held in each year in which there is to be an election for Governor or United States Senator for nominating candidates for the applicable offices, and for other proper purposes.

SECTION C. District Conventions

A District Convention, which may be the Quadrennial or Biennial District Convention, or Primary shall be held in each year in which there is to be an election for Congressman for nominating a candidate and for other proper purposes.

SECTION D. Legislative Convention

A Legislative District Mass Meeting, Party Canvass, Convention, or Primary shall be held in each year in which there is to be an election for members of the General Assembly from the Legislative District for nominating a candidate(s) and for other proper purposes.

SECTION E. Unit Conventions

A Unit Mass Meeting, Party Canvass, Convention, or Primary shall be held in each year in which there is to be an election for local or constitutional offices for nominating candidates for the applicable offices, and for other party purposes.

SECTION F. Unit Representation
Representation in all State and District Conventions shall be by Units based upon the Republican Party Voting Strength, but each unit shall be entitled to at least one delegate vote.

SECTION G. Uniform Ratio
Representation in Legislative District and Unit Conventions shall be by either Units, Wards, Magisterial Districts, Precincts, or the like, on a uniform ratio established by the appropriate Official Committee, but each such political subdivision shall be entitled to at least one delegate vote.

SECTION H. Delegates

1. Certification

a. Delegates and alternates to a Convention shall be certified to that Convention by the permanent Chairman, and Secretary of the Mass Meeting, or Convention which selected, or by the Chairman of the Official Committee which may have conducted a party canvass to select, the delegates and alternates. The certifications shall be delivered to the Chairman of the official Committee which called the Convention prior to the convening of the Convention. Except in the case of the State Central Committee, a copy of the certification shall also be delivered to the secretary of the official committee. Such Chairman shall be responsible for the preparation of a roll of all such certifications which roll shall thereafter govern the procedures of the Convention, unless and until changed by the Convention.

b. In the case of a State Convention a copy of unit certifications shall also be delivered to its District Chairman.

c. In the case of a District Convention, said certifications must be delivered to the appropriate District Chairman and Secretary seven (7) days prior to the convening of said Convention. In the case of a State Convention, said

certifications must be postmarked sixteen (16) days prior to the convening of the Convention or delivered in person fourteen (14) days prior to the convening of said Convention. After the filing deadline of the certifications, no change may be made except a certified alternate may be made a delegate. A copy of the published official call of the Convention, Mass Meeting, or Party Canvass called for the purpose of selecting delegates and alternates to convention must accompany the certification with the date of the publication included.

d. A delegate or alternate who is not certified in accordance with the above requirements shall be seated only by a majority vote of the Credentials Committee, or in the event of the failure of the Credentials Committee to seat, by a vote of the Convention.

2. A delegation to a Convention may not have more than five (5) delegates and five (5) alternates per delegate vote. No delegate may have less than 0.20 votes.

3. The certification of delegates may state how the delegates shall vote whether by those present voting full vote, or non-full vote, and if an how an allocation of votes is fractionalized. A delegation shall vote full vote unless otherwise designated by the electing body.

a. Full vote means the delegates present and voting at the Convention may cast the full vote of the delegation with proportionate weight given to majority and minority vote. Example: If a County has ten votes to a Convention but only six delegates are present at the Convention and four desire to support one candidate and two desire to support another candidate, the four delegates would cast 6.67 votes for their candidate and the two delegates would cast 3.33 votes for their candidate.

b. Non-full vote shall mean that each delegate will only be entitled to the vote to which he is certified. Example: if a County has ten votes to a Convention and elects fifty delegates non-full vote, each delegate present at the Convention would have 0.20 vote.

c. The vote of a delegation shall be reported to the nearest hundredth. Example: If a 37-vote delegation has 85 delegates present with 22 voting for A and 63 voting for B, A's vote would be 22/85 x 37 =9.58; B's vote would be 63/85 x 37 = 27.42.

4. No delegation shall vote under a unit rule at any Convention; however, the Mass Meeting, Party Canvass, or Convention electing the delegates may instruct its delegates on candidates or specific issues. Unless otherwise provided in the instruction, an instruction shall be deemed to be limited to the first Convention ballot in respect of the election or other matters covered by the instruction.

5. The delegates present in a given delegation shall designate which alternate shall vote in the place of an absent delegate, except where the body electing the delegates has determined that another method of alternate selection shall he used.

SECTION I. Rules

1 . The Official Committee shall prepare the rules and order of business for the conduct of a Convention in advance thereof. Said rules and order of business shall then be submitted to the Committee on Rules of such Convention for its consideration and report to the Convention.

2. The official Committee shall prepare the rules for the conduct of a Party Canvass subject to the provisions of the State Party Plan.

3. All Mass Meetings, Party Canvasses, Conventions, and Primaries shall, to the extent applicable, by governed by and conducted in accordance with, giving precedence as listed to, the following: The State Party Plan, District or Unit Plan or By-Laws; rules adopted by a designated Rules Committee; and otherwise in accordance with the then current edition of Robert's Rules of Order.

SECTION J. Primaries

When an Official Committee has declared for a Primary for nominating candidates for public offices, the State Central Committee shall establish consistent with State Law the necessary rules and regulations for the conduct of such Primaries and assist in every practical manner.

SECTION K. National Convention Delegates

Procedures concerning Conventions at which delegates and alternates to National Conventions are elected shall comply with the applicable Rules of the National Republican Party.

SECTION L. Public Meetings

Every Mass Meeting, Party Canvass, or Convention shall be held in a building appropriate for public use and shall be open to the public. If after a call for a Mass Meeting, Party Canvass, or Convention, it shall be determined that the size of the building designated in the call shall be inadequate relative to the anticipated attendance or the building designated in the call, the location may be changed by the Chairman issuing the call to a more adequate, but equally accessible, building provided that written notice of the new location be posted at the location originally selected for the meeting, and further provided that those attending are allowed sufficient time to be present at the alternate location and to participate in the Mass Meeting, Party Canvass, or convention.

SECTION M. Special elections

Special Mass Meetings, Party Canvasses, and Conventions shall be held to nominate candidates in special elections and for other proper purposes.

SECTION N. Divided Units

1. No member of a Unit Mass Meeting, Party Canvass, or Convention shall vote for delegates to a Convention of a District of which he is not a resident.

2. When a Mass Meeting or Convention has divided in order to choose delegates to different Election District Conventions, each resulting division may, by majority vote, elected to adopt its own rules and it shall otherwise be conducted in accordance with Article VIII, Section 1.3 of the State Party Plan.

ARTICLE IX
Change in Boundaries

In the event the boundaries of a Unit are changed between the time of the last preceding Gubernatorial or Presidential elections and the time set for a State or District Convention, the Republican Party voting strength shall be transferred between the Units affected on the basis of the percentage of registered voters by Precincts which have been transferred.

In the event the boundaries of a Legislative District, Ward, Magisterial District or Precinct are changed, then a method equal or similar to that aforementioned shall be used for determining the Republican votes transferred between the affected political subdivisions and therefore the revised Delegate allotments of Committee memberships.

ARTICLE X
Rulings and Appeals

SECTION A. Rulings

1. Any Chairman of an Official Committee or twenty (20) percent of the members of an official Committee may request a ruling or interpretation of the State Party Plan from the General Counsel. The General Counsel's determination shall be binding unless and until overturned upon appeal, either to the Appeals Committee or directly to the State Central Committee.

2. The Appeals Committee shall consist of the State Chairman, all of the State Vice Chairmen and a General Assembly Committee Member appointed by the Joint Republican Legislative Caucus. The State Chairman shall promptly convene this Committee when necessary, either in person or by telephone, and shall participate in its deliberations and decisions.

3. In the event of an appeal to the Appeals Committee and a concurrence by a majority of that Committee with the Ruling or interpretation of the General Counsel, it may be further appealed to the State Central Committee, whose decision shall be binding in accordance with Article X, Section C.

SECTION B. Contests

1. Each Unit Committee shall decide all controversies and contests arising within its jurisdiction, but those persons deemed adversely affected by any such decision shall have the right of appeal to the appropriate District Committee. In the case of a split Unit, if the controversy or contest specifically relates to the operations or affairs of a particular Congressional or Legislative District, an appeal shall be taken to that District Committee; if not, an appeal shall be taken to the District Committee of the District wherein the person appealing resides.

2. Each District Committee shall decide all controversies and contests arising within its jurisdiction. It shall also hear and decide all timely appeals taken from units within the District. Persons deemed adversely affected by a decision of the District

Committee shall have the right of appeal to the State Central Committee.

3. All appeals, under sub-sections 1 and 2 of this section must be made in writing within thirty (30) days after the decision appealed from and the appeal must be accompanied by a petition signed by at least twenty-five (25) Party members of the Unit or District affected.

SECTION C. Finality
The State Central Committee shall make the final decision, upon timely appeal, on all Party controversies and contests in any Election District of the State, rulings of the General Counsel and on all other matters deemed to affect the efficiency of the Party organization or the success of the Party.

ARTICLE XI
Amendments

The State Party Plan may be amended by any State Convention by three-fourths (3/4) roll call vote; or by the State Central Committee by three-fourths (3/4) of its members present, but not less than a majority of the total members, after notice of such intent and general text of such amendment has been included in the call of the meeting.

Exhibit B

**CALL FOR THE STATE CONVENTION OF THE REPUBLICAN PARTY OF VIRGINIA FOR FRIDAY, JUNE 3, 1994, AT TWO O'CLOCK P.M.
AND SATURDAY JUNE 4, 1994 AT TEN O'CLOCK A.M., RICHMOND COLISEUM, RICHMOND, VIRGINIA**

As Chairman of the Republican Party of Virginia and pursuant to the Party Plan and as recommended and directed by the State Central Committee, I, Patrick M. McSweeney, do hereby issue this Call for a State Convention to be held at the Richmond Coliseum, Richmond, Virginia, starting at two o'clock (2:00) p.m. local time on Friday, June 3, 1994, for the purpose of nominating a Republican candidate for the office of United States Senator and for the transaction of such other business as may properly come before the Convention; and I further direct the Executive Director of the Republican Party of Virginia to publish this Call in a daily newspaper of general circulation in the Commonwealth at least thirty (30) days prior to the convening date of the State Convention, as required by the Party Plan.

QUALIFICATION FOR PARTICIPATION

All legal and qualified voters under the laws of the Commonwealth of Virginia, regardless of race, religion, national origin, or sex, who are in accord with the principles of the Republican Party of Virginia and who, if requested, express in open meeting, either orally or in writing as may be required, their intent to support all of its nominees for public office in the ensuing election, may participate as members of the Republican Party of Virginia in its Mass Meetings, Party Canvasses, Conventions or Primaries encompassing their respective Election Districts.

COMPOSITION OF CONVENTION

The State Convention shall be composed of delegates and alternates of the respective units they represent. Representation shall be based on the total number of Republican votes cast in each county and city in the last preceding presidential and gubernatorial elections. Each unit is allowed one delegate vote and one alternate vote for each 250 Republican votes cast or major portion thereof. Each county or city shall be entitled to at least one delegate and one alternate.The delegates and alternates shall be elected in county and city Mass Meetings, Conventions or Party Canvasses that shall be held between March 1, 1994 and April 1, 1994 (except for the City of Alexandria which shall be between February 26, 1994 and April 1, 1994). If Units require pre-filing of delegates the deadline may not be before February 26, 1994 (except for the City of Alexandria which may not be before February 23, 1994). These shall be called for this purpose in conformity with the Party Plan of the Republican Party of Virginia by each unit committee in the state.

CERTIFICATION OF DELEGATES

The delegates present in a given delegation shall designate which alternates shall vote in the place of an absent delegate, except where the electing body that elected the delegates has determined another method of alternate selection. (Note: Full vote means that the delegates present and voting at the Convention may cast the full vote of the delegation with proportionate weight given to majority and minority vote. Non-full vote shall mean each delegate will only be entitled to vote the vote to which he is certified.) The said delegates and alternates to the State Convention so elected shall be certified in writing with their respective names and addresses (including zip codes) over the signatures of the permanent chairman and permanent secretary of the county or city Mass Meeting, Convention, or Party Canvass, as well as the signature of the current unit chairman. If the Certification and registration fee is postmarked or delivered in person no later than fourteen (14) calendar days following the local Mass Meeting, Convention or

Party Canvass, then the registration fee shall be $35.00 for each delegate and alternate certified. If the Certification and registration fee is postmarked or delivered in person more than fourteen (14) calendar days following the local Mass Meeting, Convention or Party Canvass, then the registration fee shall be $45.00 for each delegate and alternate certified.

ALL CERTIFICATIONS AND FEES, REGARDLESS OF DATE OF LOCAL MASS MEETING, CONVENTION OR PARTY CANVASS, MUST BE POSTMARKED NO LATER THAN SIXTEEN (16) DAYS PRIOR TO THE CONVENING OF THE SAID CONVENTION (MAY 18, 1994), OR DELIVERED IN PERSON FOURTEEN (14) DAYS PRIOR TO THE CONVENING OF THE SAID CONVENTION (MAY 20, 1994).

After a Certification is received, or the May 20 deadline is reached or has passed, no changes, additions or deletions may be made, except a certified alternate may be made a delegate.

Payments for registration fees are not deductible as charitable contributions for income tax purposes. Fees will be used for Federal and State election purposes. No refunds will be issued after May 20. A copy of the published Call of the Convention, Mass Meeting, or Party Canvass, called for the purpose of selecting delegates and alternates to said Convention, must accompany the certification, with the date of publication included. Certification should be mailed or delivered as follows:

* ORIGINAL: PAGE ONE OF THREE
  Mr. Patrick McSweeney, Chairman
  Republican Party of Virginia
  115 East Grace Street
  Richmond, Virginia 23219

* SECOND COPY: PAGE TWO OF THREE
  The respective District chairman

* THIRD COPY: PAGE THREE OF THREE
For the Unit's records

NOTE: A delegate or alternate is not certified until his name, address and phone number has been provided on the Certification and all his fees have been paid.

Authorized by the Republican Party of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

[Caption omitted]

NOTICE OF DISMISSAL

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(i), plaintiffs in the above named case hereby voluntarily dismiss Count 5 of the Complaint against Oliver North for U.S. Senate Committee, Inc.

George A. Rutherglen
Counsel of Record
Virginia State Bar No. 18938
580 Massie Road
Charlottesville, VA 22903-1789
(804) 924-7015

[Names and addresses of other counsel omitted in printing]

Date: June 8, 1994

(1)

No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

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BRIEF FOR APPELLANTS

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Attorneys for Appellants

62 pp

QUESTIONS PRESENTED

1. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party rule governing eligibility to participate in the process of nominating a candidate for United States Senate?

2. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party's decision to hold a convention and to impose a non-waivable $45 fee on all voters who wish to participate in the process of nominating that party's candidate for United States Senator?

3. Does section 5 of the Voting Rights Act of 1965 require preclearance of a political party's decision to hold a convention and to impose a non-waivable $45 filing fee on all candidates for the position of delegate to a state convention called to nominate that party's candidate for United States Senator?

4. Can individual voters who have been forced to pay an illegal poll tax or who claim to have been deterred from participating in an election by the existence of such a tax bring suit under section 10 of the Voting Rights Act, which explicitly outlaws poll taxes?

PARTIES

The following were parties in the courts below:

Fortis Morse;

Kenneth Curtis Bartholomew; and

Kimberly J. Enderson

Plaintiffs;

The Oliver North for U.S. Senate Committee, Inc.;

The Republican Party of Virginia; and

The Albemarle County (Virginia) Republican Committee

Defendants.

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No. 94-203

IN THE

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Appellees.

On Appeal from the United States District Court for the Western District of Virginia

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion and order of the three-judge district court are contained in the Appendix to the Jurisdictional Statement [hereafter "J.S. App."], at pages A-2 to A-13; the opinion is reported at 853 F. Supp. 212 (W.D. Va. 1994).

JURISDICTION

The district court entered judgment against appellants on May 18, 1994. J.S. App. at A-13. The Notice of Appeal was filed on June 8, 1994. J.S. App. at A-19. This Court

noted probable jurisdiction on January 23, 1995. This Court's jurisdiction rests on 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

This case involves section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c, which is reprinted in the J.S. App. at pages A-15 to A-17, and section 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, which is reprinted in the J.S. App. at pages A-17 to A-18. It also involves section 14(c)(1) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(c)(1), which provides, in pertinent part:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, ... casting a ballot and having such ballot counted properly with respect to candidates for public or party office ....

STATEMENT OF THE CASE

Article II, § 4 of the Constitution of Virginia states that "[t]he General Assembly shall provide for the nomination of candidates ... and shall have power to make any other law regulating elections not inconsistent with this Constitution." Pursuant to Art. II, § 4, Virginia law sets out two methods for placing candidates for United States Senator on the general election ballot. "Independent" candidates must submit a petition of candidacy demonstrating a significant level of voter support across the state. Va. Code § 24.2-

506.[1] Nominees of "political parties," by contrast, are placed on the general election ballot automatically. *See* Va. Code § 24.2-511.

"Political party" is a legal term of art.[2] Under Virginia law, only two organizations qualify for the status of "political parties" and its attendant benefit of automatic access to the general election ballot: the Democratic Party of Virginia and one of the appellees in this case, the Republican Party of Virginia ("RPV" or "the Party").[3]

Virginia pervasively regulates and confers advantages on the party nomination process for senatorial candidates. The Commonwealth permits parties with automatic ballot access to make nominations by convention as well as by primary. *See* Va. Code § 24.2-508. But notwithstanding the general right of political parties to choose how to nominate senatorial candidates, a party

> "whose candidate at the immediately preceding election ... (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was

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1 Section 24.2-506 requires that candidates for United States Senate submit petitions equal to one-half of one percent of the number of registered voters, with at least 200 voters from each congressional district. To get on the general election ballot in 1994 required roughly 15,000 signatures.

2 "'*Party*' or '*political party*' means an organization of citizens of the Commonwealth which, at either of the two preceding statewide general elections, received at least ten percent of the total vote cast for any statewide office filled in that election. The organization shall have a state central committee and an office of elected state chairman which have been continuously in existence for the six months preceding the filing of a nomination for any office." Va. Code § 24.2-101.

3 *See* 1986-1987 Op. Atty Gen. Va. 204.

> elected at the general election, shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method."

Va. Code § 24.2-509(B). Thus, the Commonwealth delegates control over the choice between primaries and conventions either to a publicly elected official -- the incumbent Senator of a political party -- or to party officials in the absence of a public official from the relevant party. In the case of the RPV, Virginia law gave the Party *carte blanche* over the method of nominating its senatorial candidate in 1994, since that seat was held by a Democrat. In 1996, however, the RPV's autonomy will be restricted, since § 24.2-509(B) apparently gives the incumbent Republican Senator, John Warner, the right to require a primary if he so chooses.[4]

When a party chooses to nominate its senatorial candidate by convention, Virginia law imposes several requirements. For example, the party must nominate its candidate for a general election in November "by 7:00 p.m. on the second Tuesday in June," Va. Code § 24.2-510. At the same time, the party convention cannot occur too early in the electoral cycle: "a party shall nominate its candidate for any office by a nonprimary method only within the thirty-two days immediately preceding the primary date established for nominating candidates for the office in question." *Id.*; *see also* Va. Code § 24.2-511 (setting out procedures for certifying the nomination of candidates nominated by a convention to the State Board of Elections). The legislative

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[4] The nomination for Senator Warner's seat at the last election in 1990 was scheduled to be made by a primary, but the primary was cancelled when no candidate filed to oppose him. Joint Appendix 24 (hereafter "J.A.").

committee that prepared the 1970 revision of § 24.2-511's predecessor explained its purpose as being to "place all party nominees in the same relative position before elections whether nominated by primary, convention, endorsement or other means." Report of the Election Laws Study Commission, H. Doc. No. 14, at 86 (1969).

Over the past three decades, the RPV has used a variety of methods for nominating its candidates for U.S. Senator. In 1964 and 1978, for example, the Party's State Central Committee chose the nominee, while in several other years, the nominee was chosen by a statewide convention. In 1990, the RPV decided to choose its nominee by primary, but the primary was cancelled when no challenger opposed the renomination of the Republican incumbent.

In December 1993, the Central Committee decided to return to selecting the party's nominee through a convention. Accordingly, it issued a call for a convention to occur over the first weekend in June 1994. All registered voters who were in accord with the Party's principles and who were willing if requested to declare "their intent to support all of its nominees for public office in the ensuing election," J.A. 61, were entitled to participate in local mass meetings to "elec[t]" delegates to the state convention. J.A. 62.[5] But any voter who wished to participate at the state level, where the actual nominating decision was made, was required to file as a "delegate" and pay a non-waivable $35 or $45 registration fee.

Under the RPV's own rules, delegates were to be "elected" at the mass meetings to attend the convention. J.A. 62. In fact, however, as a matter of longstanding party

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[5] Virginia does not have party registration.

practice, J.A. 6,[6] *any* voter who pledged to support the Party's nominee and paid the fee was certified as a delegate and, when he or she reached the convention, was free to vote for the candidate of his or her choice.[7] Over 14,600 voters were certified as "delegates" eligible to attend the convention and vote their preferences. In effect, the state convention operated, as it had in the past, as a "great indoor primary," Frank B. Atkinson, The Dynamic Dominion: Realignment and the Rise of Virginia's Republican Party Since 1945, at 343 (George Mason Univ. Press 1992).

Although the RPV has imposed a variety of different "filing fees" over the years, *see* J.A. 24, it has neither sought nor received preclearance either of any of those fees or of its shifts between methods of nominating senatorial candidates.

Appellants Fortis Morse, Kenneth Curtis Bartholomew, and Kimberly Enderson are registered voters in Virginia. Morse and Enderson have long been active in Republican politics; Bartholomew is an independent. All three wanted to participate in selecting the Party's 1994 senatorial nominee and were legally qualified to do so.

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6 Because this case is before the Court on appellees' motion to dismiss, the factual allegations in the complaint must be taken as true. *See also* Transcript of Oral Argument at 30 (May 18, 1994) (statement of counsel for the RPV that while the party's rules provide for the selection of delegate slates and for the "instruct[ion of] delegations" on how to vote, "the campaigns, as a matter of tactics to maintain Party unity, haven't been doing it").

7 The weight attached to an individual's vote is governed by a formula that takes into account the level of support for Republican presidential and gubernatorial candidates in the voter's city or county. Appellants have not challenged any of the Party's internal rules regarding how voting at conventions is to be conducted.

Both Bartholomew and Enderson, however, were deterred from attending the convention by the $45 fee. Thus, they were completely excluded from the process of nominating a Republican candidate for United States Senate.

On February 28, 1994, Morse sought, from appellee Albemarle County Republican Committee (which under party rules was responsible for collecting the fee and certifying "delegates"), a waiver of the $45 fee on the grounds of economic hardship. A Committee official told Morse that the fee was mandatory but informed him that one of the candidates was paying the fees of voters who supported that candidate. Ultimately, the Albemarle County Coordinator of the Oliver North for U.S. Senate Committee gave Morse $45 to reimburse him for the fee, indicating that if Morse did not attend the convention "we'll hunt you down." Morse subsequently repaid the $45 to the North Committee and attended the convention, where he supported North's rival, James Miller.

Following investigation of the pervasiveness of the reimbursement scheme and their potential legal claims, appellants filed this lawsuit in the United States District Court for the Western District of Virginia.[8] They alleged that the filing fee constituted a "standard, practice, or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act; because the Party had never received preclearance for the fee, or its decision to raise the fee over time, its imposition violated section 5.

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8 The district court stated that the appellants delayed over five months in filing this action. J.S. App. at A-5. This statement presupposes that appellants should have filed suit as soon as the call for the convention was issued in December 1993, rather than in May 1994. This would have required them to act without first attempting to file or to seek a waiver, as appellant Morse did, and without any investigation of the factual or legal bases of their claims. *See* Fed. R. Civ. P. 11.

They also alleged that the Party's imposition of a filing fee violated section 10 of the Voting Rights Act, which prohibits the use of poll taxes or substitutes therefor. In addition to these statutory claims against the Party and the Albemarle County Republican Committee, appellants raised constitutional challenges to the fee under the Equal Protection Clause of the Fourteenth Amendment and the Twenty-Fourth Amendment. Finally, they alleged that the North campaign's practice of paying or offering to pay the fee for voters who indicated a commitment to support Oliver North violated section 11 of the Voting Rights Act of 1965 as amended. They invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343 and under 42 U.S.C. §§ 1973h(c) and 1973j(f).

Appellants did *not* seek to halt, delay, or disrupt the convention. Rather they sought only an injunction permitting all individuals who were otherwise qualified -- because they were registered voters prepared to pledge their support to the ultimate Republican nominee -- to attend the convention. In addition, they sought declaratory relief and a permanent injunction against requiring a registration fee unless federal preclearance was first obtained, as well as restitution of the registration fee paid by appellant Morse.

A three-judge district court was convened to hear appellants' section 5 and section 10 claims. After an expedited briefing process, that court held oral argument on May 18, and on the same day issued its opinion. It remanded appellants' constitutional and section 11 claims to the single-judge district court[9] and dismissed appellants'

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[9] Appellants do not challenge the three-judge court's decision to remand their constitutional and section 11 claims to the single-judge court. Simultaneously with their filing of the Notice of Appeal in this proceeding, appellants voluntarily dismissed their section 11 claim against the Oliver North for U.S. Senate Committee, since the convention had already occurred and they had sought only declaratory and injunctive relief against that defendant. J.A. 2, 65. Appellants also moved to postpone consideration of their constitutional claims against the RPV and the Albemarle County Republican Committee pending this Court's resolution of the statutory issues presented by this appeal. The single-judge district court granted that motion on October 19, 1994. J.A. 3.

claims under sections 5 and 10.

With regard to appellants' section 5 claim, the district court recognized that section 5 extends to political parties. But it thought that section 5's reach was limited to a party's conduct of a primary election. The district court held that neither a party's practices relating to a nominating convention nor the process of selecting delegates to such a convention through mass meetings or party canvasses was subject to section 5 review. *See* J.S. App. at A-8 to A-11. According to the district court, the result was compelled by this Court's summary affirmance in *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972).

With regard to appellants' section 10 claim, the district court held that the Act did not authorize suits by private citizens. It concluded that only the Attorney General is authorized to bring suit against illegal poll taxes. J.S. App. at A-11 to A-12. Individual voters who have been forced to pay such a tax, or who have been deterred from voting because of it, the district court declared, have no cause of action under section 10.

SUMMARY OF ARGUMENT

Virginia has had a long history of excluding people from the franchise for financial reasons. *See, e.g., Harman v. Forssenius*, 380 U.S. 528 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). This case presents a challenge to a financial condition imposed by the RPV in its capacity as a state actor involved in deciding which candidates for United States Senator will appear on the general election ballot. Section 5 of the Voting Rights Act provides that changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" imposed within the Commonwealth of Virginia require federal preclearance before they can be implemented; the RPV's exaction of a $45 fee to participate fully in the process of nominating a senatorial candidate is such a change. Section 10 of the Voting Rights Act was intended to vindicate voters' constitutional entitlement to participate in an election process free from the imposition of financial conditions; appellants, as voters whose rights were impaired by the RPV's $45 fee, are entitled to use the Act's procedures to secure their rights.

Affirmance of the district court's decision would resurrect precisely the dangers that prompted the enactment of the Twenty-Fourth Amendment; the passage, amendment, and extension of the Voting Rights Act; and this Court's decision in *Harper*. Under the rationale advanced by the RPV and subscribed to by the district court, states and political parties could evade these constitutional and statutory guarantees by "privatizing" the political process, in clear violation of this Court's decision in *Terry v. Adams*, 345 U.S. 461 (1953). Section 5's preclearance regime was enacted precisely to prevent such circumvention. In particular, the exaction of a fee to take part in the nomination

process threatens the sorts of discrimination and vote buying that motivated Congress to ban poll taxes and to require preclearance of new qualifications for participation.

Moreover, by requiring plaintiffs such as the appellants in this case to proceed against exclusionary practices under the Constitution directly, rather than requiring entities who seek to use such practices to obtain preclearance first, this Court would "shift the advantage of time and inertia" back to "the perpetrators of the evil" and away from "its victims," in disregard of the design and structure of the Voting Rights Act. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The rationale pressed by the RPV and the district court would permit political parties to exclude voters from conventions on the basis of race or require convention goers of one race to pay a fee not imposed on any other participants, as well as to impose other more "subtle" rules that "have the effect of denying citizens their right to vote because of their race." *Id.* at 565.

Affirmance of the district court would flout an unbroken line of this Court's cases stretching back over a half-century to *United States v. Classic*, 313 U.S. 299 (1941), *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, *supra*. These cases recognize that the political parties' nomination processes are an integral step in the general election process and thus implicate the right to vote. When political parties act under authority delegated by the state to determine which candidates may appear on the general election ballot and when they receive preferential access to the general election ballot for the candidates they select, they take on the status of state actors. Their process for making these nominations must therefore comply with constitutional and statutory safeguards of the right to vote. In this case, Virginia has pervasively regulated the RPV's nomination process, substantially delegated state control over the general election

ballot to the RPV, and granted substantial advantages to the RPV.

Section 5 was enacted against this constitutional backdrop and thus reaches the RPV's senatorial nomination process, including its decision to restrict full participation to voters who pay the $45 fee. The language, structure, and legislative history of the Voting Rights Act, as well as consistent administrative and judicial interpretations and congressional ratification of those interpretations, show that section 5 reaches changes with respect to voting effected by political parties acting under delegated state authority.

In this case, the RPV's imposition of the $45 fee falls within the scope of section 5 for three independent reasons. First, the RPV's senatorial nomination process, taken as a whole, falls within the definition of voting set out in section 14(c)(1) of the Act, since the process has both the purpose and the effect of determining the effectiveness of ballots cast in the general election.

Second, by its own terms, the RPV's process involves the *election* of delegates to its nominating convention. The legislative history accompanying the original enactment of sections 5 and 14(c)(1) squarely states that "an election of delegates to a State party convention would be covered by the act." H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464. Since the delegates are elected, restrictions on who can become a delegate are changes with respect to voting within the meaning of this Court's decisions in *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), *Hadnott v. Amos*, 394 U.S. 358 (1969); and *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

Third, whatever the formal characterization of the RPV's nomination process, the Party in fact permits any registered voter who pledges to support the Party's eventual nominee and who pays $45 to attend the nominating convention and to vote on who should be the Party's standard bearer. The RPV operates a *de facto* primary, albeit one at which all voters assemble together to cast simultaneous ballots. The fact that the Party does not call its process a "primary" can no more immunize it from coverage under section 5 than the fact in *Terry v. Adams* that the Texas Jaybird Association did not call *its* selection mechanism a primary could immunize it from coverage under the Fifteenth Amendment.

In addition to requiring preclearance under section 5 of changes affecting voting, Congress provided, in section 10, a special remedial scheme for voters who have been denied the right to vote by the imposition of a poll tax "or substitute therefor." Section 10 reflects three congressional determinations. First, subsection (a) contains a congressional declaration that the constitutional right to vote is violated by a poll tax. Second, subsection (b) gives authority to the Attorney General to sue to vindicate individual voters' rights that might otherwise go unprotected. And third, subsection (c) grants jurisdiction to three-judge district courts to entertain actions brought under section 10.

The statutory scheme reflects Congress' desire that poll tax claims be litigated before three-judge district courts. Denying individual voters the ability to sue under section 10 would force individuals to bring constitutional claims directly under the Fourteenth and Twenty-Fourth Amendments before a single district judge -- instead of statutory claims under section 10(a) before a three-judge district court. It would force that single judge to reach the constitutionality of a poll tax without addressing the statutory issue first. This result

is directly contrary to the special procedures for adjudicating poll tax claims established by Congress in section 10(c).

The language and structure of the Voting Rights Act reflect Congress' intent to create a private right of action under section 10. Sections 3, 12(f), and 14(f), 42 U.S.C. §§ 1973a, 1973j(f), and 1973*l*(f), all express Congress' assumption that individual citizens possess private rights of action under the Voting Rights Act's various sections. Moreover, an unbroken line of this Court's decisions has recognized private rights of action under various sections of the Voting Rights Act, including under sections 2 and 5, whose language and structure closely parallel section 10. *See, e.g., Allen*, 393 U.S. 544; *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986). And Congress has repeatedly ratified this construction of the Act in amending and extending the Voting Rights Act.

ARGUMENT

I. POLITICAL PARTY NOMINATION PROCESSES COMPRISING AN INTEGRAL PART OF STATE ELECTION MACHINERY CONSTITUTE STATE ACTION RESPECTING THE RIGHT TO VOTE

The right to vote protected by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, cannot be defined in a vacuum. The Act in general, and section 5 in particular, were intended to preserve and extend the constitutional victories against devices such as white primaries and poll taxes that had preceded the Act's passage. The Act also imposed safeguards against circumvention by states *and political parties* that had shown themselves prone "to the extraordinary stratagem of contriving new rules of various

kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach*, 383 U.S. at 335. Thus, the right protected by section 5 must be read against the backdrop of this Court's prior case law.

For more than fifty years, this Court has recognized that party nomination procedures form "an integral part of the procedure for the popular choice of Congressman" and other federal elected officials. *United States v. Classic*, 313 U.S. at 314; *see also Smith v. Allwright*, 321 U.S. at 660; *Terry v. Adams*, 345 U.S. at 469 (Black J.); *id.* at 480-81 (Clark, J.). Accordingly, the Court has held that such nomination activity falls within constitutional protection of the right to vote.

Classic concerned the question whether the predecessors to 18 U.S.C. §§ 241 and 242 -- which protect a citizen's exercise of rights "secured to him by the Constitution" -- permitted the criminal prosecution of election officials who wilfully altered and falsely counted and certified ballots cast in a primary election. The first step in the Court's analysis was to identify the constitutional right at issue. The Court located this right in Art. I, § 2 of the Constitution, which provides that members of the House of Representatives are to be "chosen by the People of the several States."[10] And the Court described the right as the "right to vote for a representative in Congress *at the general election*," *Classic*, 313 U.S. at 313 (emphasis added).

Classic held that this right was implicated in the primary

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[10] The counterpart for Senatorial elections is even more explicit: "The Senate of the United States shall be composed of two Senators from each State, *elected* by the people thereof ...." U.S. Const., amend. XVII (emphasis added).

election, not because voters in a primary election cast ballots in voting booths, but because, under Louisiana law, the primary operated as a constitutive "step in the exercise by the people of their choice of representatives in Congress." *Id.* at 317.[11] Louisiana law "restricted" voters' choice in the constitutionally protected election to candidates nominated by primary, to candidates who filed candidacy statements, and to lawful write-in candidates. *Id.* at 313. State law had thus converted "the mode of [constitutionally protected] choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election." *Id.* at 316-17. "The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana is thus the right to participate in that choice." *Id.* at 314.

In explaining why the Democratic primary effectively "operate[d] to deprive the voter of his constitutional right of choice" at the general election, *id.* at 319, *Classic* expressly relied on Justice Pitney's concurring opinion in *Newberry v. United States*, 256 U.S. 232 (1921).[12] There, Justice Pitney

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11 The appellees apparently understood the functional equivalence of various nominating devices since they argued that "[a] nominating primary is not an election any more than the nominating convention, or its predecessor the caucus, is an 'election.'" 313 U.S. at 306.

12 *Newberry* had reversed a number of convictions obtained under the Federal Corrupt Practices Act for illegal expenditures within the primary process. Justice McReynolds's opinion for the Court was based on the proposition that Art. I, § 4 gave Congress no regulatory authority over primary elections. Justice McKenna, who provided Justice McReynolds's opinion with a necessary fifth vote, rested his support on the fact that the statute had been enacted prior to the Seventeenth Amendment (which required popular election of senators); he left open the possibility that Congress might have the power under that amendment to regulate senatorial primaries. *See* 256 U.S. at 258. Chief Justice White, *see* 256 U.S. at 275, and Justice Pitney, joined by Justices Brandeis and Clarke, concurred in the reversal of the convictions because they found prejudicial trial error. They dissented, however, from the Court's constitutional holding, because they believed Congress did have the power to regulate primary elections.

explained that:

> "It seems to me too clear for discussion that primary elections *and nominating conventions* are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government that power to regulate them is within the general authority of Congress.... As a practical matter, the ultimate choice of the voters is predetermined when the nominations have been made. Hence, the authority of Congress to regulate the primary elections *and nominating conventions* arises, of necessity, not from any indefinite or implied grant of power but from one clearly expressed in the Constitution itself (Art. I, § 8, cl. 18 [the Necessary and Proper Clause]) ....

Id. at 285-86 (emphasis added). *See Classic*, 313 U.S. at 319 (citing this part of Justice Pitney's opinion).

Finally, *Classic* explained the necessity for constitutional protection of the nomination process by stating that "[u]nless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection." *Id.* at 319.

Smith v. Allwright extended *Classic*'s analysis from Art.

I, § 2 to the Fifteenth Amendment's prohibition against racial discrimination in voting. The Texas Democratic Party operated a primary limited to white registered voters. The Court held that this restriction violated the Fifteenth Amendment. Again, the Court's focus was not directed at what happened within the primary itself -- "[t]he privilege of membership in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55, no concern of a State," *Smith*, 321 U.S. at 664 -- but rather at the relationship between the nomination process and the general election. Once again, it was the "unitary character of the electoral process," and the primary's status as "an integral part of the election machinery," *Smith*, 321 U.S. at 661, 660, that transformed the party's venture into state action. "If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot," *id.* at 664, then "state delegation to a party of the power to fix the qualifications of primary elections," that is, the persons who perform the state-created nominating function, "is delegation of a state function that may make the party's action the action of the State." *Id.* at 660. It was not simply the fact that voters went into booths and cast ballots that rendered the Democratic Party's nomination process state action; Texas apparently required ratification of the primary results by a party's state convention before they were certified to the Secretary of State for placement on the ballot, *see Smith*, 321 U.S. at 653 n. 6 & 663; *Dickson v. Strickland*, 265 S.W. 1012, 1013 (Tex. 1924).

Terry v. Adams makes clear that nomination activity by political organizations is covered by the Fifteenth Amendment even when it does not involve a formal primary election. In *Terry*, the challenged activity was *antecedent to*

the formal party primary, *see* 345 U.S. at 463 (Black, J.), but the Court nonetheless found that the exclusion of blacks from this pre-primary activity violated the Fifteenth Amendment.

Justice Clark's opinion for himself and three other Justices observed that "[a]n old pattern in new guise is revealed by the record... In earlier years, the members at mass meetings determined their choice of candidates to support at forthcoming official elections. Subsequently the Association developed a system closely paralleling the structure of the Democratic Party." 345 U.S. at 480 (Clark, J.). Nothing in Justice Clark's opinion suggested it was the change in method that brought the Jaybirds under constitutional constraint. Indeed, the practice of *vive voce*, or oral, voting was a traditional American device. *See* G. Edward White, *Reading the Guarantee Clause*, 65 U. Colo. L. Rev. 787, 796-97 (1994).

Justice Clark identified the prohibited state action thus:

> "[W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."

345 U.S. at 484. Similarly, Justice Black, for himself and three other Justices, found that the Fifteenth Amendment was implicated because "[t]he Jaybird primary has become an integral part ... of the elective process that determines who

shall rule and govern in the county." *Id.* at 469 (Black, J.).[13]

Taken together, then, *Classic*, *Smith*, and *Terry* squarely establish the principle that party nomination activities that are regulated by the state and that essentially shape the general election ballot for public offices form an integral part of the right to vote. When a state delegates to private organizations like the RPV the critical electoral function of "winnow[ing]" the field of potential candidates down to a manageable few for the general election ballot, *see Storer v. Brown*, 415 U.S. 724, 735 (1974), then the party's activities in that context become state action affecting the right to vote. It follows that the party's decisions about the winnowing process become subject to regulation under both constitutional provisions such as Article I and the Fourteenth and Fifteenth Amendments and congressional statutes intended to enforce those constitutional rights.

II. THE RPV'S CHANGE IN THE RULES GOVERNING WHO COULD PARTICIPATE IN SELECTING THE PARTY'S CANDIDATE FOR UNITED STATES SENATOR REQUIRED PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The Voting Rights Act was enacted against the backdrop of political parties' intimate involvement in the electoral process. Section 14 (c)(1) of the Act, which defines the

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13 That *Smith* and *Terry* concerned one-party jurisdictions was not essential to their holdings: as *Classic* explained, the right to participate is protected even if the party primary "invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S. at 318.

terms "vote" and "voting," was expressly amended to reach party practices related to nominating conventions. As Rep. Jonathan B. Bingham, the author of the amendment that expanded section 14(c)(1) to cover elections to "party office," explained on the floor of the House:

> I recommended the addition of language which would extend the protections of the bill to the type of situation which arose last year when the regular Democratic delegation from Mississippi to the Democratic National Convention was chosen through a series of Party caucuses and conventions from which Negroes were excluded.

111 Cong. Rec. 16273 (July 9, 1965). *See also Perkins v. Matthews*, 400 U.S. 379, 389 (1970) (quoting the observation of the executive director of the Civil Rights Commission during the 1969 hearings on the extension of the Voting Rights Act that "State legislatures *and political party committees* in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters"). Accordingly, Congress intended to require preclearance under section 5 of party rules that limited the eligibility of voters to participate in the nomination process.

The language, structure, and legislative history of the Voting Rights Act all demonstrate that the Act was intended to reach the parties' performance of the state-delegated public electoral functions of nominating candidates for federal office. Moreover, the consistent administrative interpretation of section 5, to which this Court has traditionally accorded substantial weight, has also concluded that section 5 applies to party nomination processes. With one inapposite exception, the case law reaches the same result.

Affirmance of the district court's decision to exempt the RPV from the obligation to preclear its imposition of a fee to participate in its nomination process would flout three decades of Voting Rights Act case law and would require this Court implicitly to overrule the understanding of the right to vote established in *Classic*, *Smith v. Allwright*, and *Terry*. This Court should instead hold that section 5 reaches all changes in eligibility to participate in the electoral process, whether the state enacts those changes directly or instead permits private groups to whom it has delegated the nominating function to make them.

A. *The text and legislative history of section 5 show Congress' intent to cover the nomination activities of political parties, including conventions*

Section 5 of the Voting Rights Act reaches "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c. The Voting Rights Act was enacted to enforce the Fifteenth Amendment to the Constitution, *see* Pub. L. 89-110, 79 Stat. 437 (and amended and extended to enforce the Fourteenth Amendment as well, *see* S. Rep. No. 97-417, p. 40 n. 152 (1982)). Its understanding of what the right to vote means is at least as broad as those Amendments', which, as we have seen, comprehends coverage of the right to participate fully in the party nomination process as well as in the general election. *See United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 117 (1978) ("[t]he language, structure, history, and purposes of the Act persuade us that § 5, like the constitutional provisions it is designed to implement, applies to all entities having power over any aspect of the electoral process within designated jurisdictions").

That Congress intended the right protected by the Act to have this meaning is clear from the Act's definitional provision:

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, *but not limited to*, registration, ... casting a ballot, and having that ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or *party office*."

Voting Rights Act, § 14(c)(1), 42 U.S.C. § 1973*l* (c)(1) (emphasis added). Thus, by its very terms, the Act reaches beyond the formal action of casting a ballot. If voting in the general election is profoundly shaped by the outcome of the party nomination process, then the vote of an individual who has been excluded from that stage will not be as effective as if the voter had had the right to participate fully.

This realism about the electoral process underlies Congress' flat declaration that the definition of the right to vote provided in section 14(c)(1) reaches party nominating conventions: "an election of delegates to a State party convention would be covered by the act." H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464; *see also* 111 Cong. Rec. 16273 (July 9, 1965) (the inclusion of "party office" within § 14(c)(1) "extend[s] the protections of the bill to ... [delegates] chosen through a series of Party caucuses and conventions").

The scope of section 5 is confirmed by the language of

section 2, which is intended to work in tandem with it.[14] Section 2 provides that voting practices or procedures "result in a denial of the right ... to vote" when "the political processes leading to nomination or election" are not equally open to all voters. 42 U.S.C. § 1973(a), (b). This phrase also acknowledges the centrality of the nomination process, whatever its form, as the legislative history's reference to the salience of "candidate slating process[es]" shows. *See* S. Rep. No. 97-417 at 29; *White v. Regester*, 412 U.S. 755, 766-67 (1973).

In this case, the RPV's behavior falls well within the scope of section 5. The Commonwealth of Virginia has delegated to the RPV a major share of the function of "winnow[ing]" the general election ballot down to a few serious candidates, *Storer*, 415 U.S. at 735, and in return provides the Party with an automatic spot on the general election ballot. The Commonwealth substantially regulates the RPV's performance of this function, determining when

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14 *See* H.R. Rep. No. 97-227, 97th Cong., 1st Sess., p. 28 (1982) ("Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under section 2] or preclearance [under section 5]"). This Court has consistently construed section 5 to be at least as broad as section 2. *See Chisom v. Roemer*, 111 S.Ct. 2354, 2367 (1991). The recent decision in *Holder v. Hall*, 62 U.S.L.W. 4728 (1994), is not to the contrary. First, there was no opinion for the Court. Second, the clear import of Justice Kennedy's and Justice O'Connor's opinions is that section 5 is, if anything, *broader* in its scope than section 2. *See Holder*, 62 U.S.L.W. at 4731 (Kennedy, J.) (suggesting that the requirement of preclearance under section 5 does not necessarily mean a practice is also vulnerable to attack under section 2); *id.* at 4732 (O'Connor, J., concurring in part and concurring in the judgment) (stating that whether a section 2 dilution claim may be brought raises "more difficult questions" than whether a practice marks a change with respect to voting under section 5); *cf. id.* at 4750 (Blackmun, J., dissenting) (stating that the scope of section 2 and section 5 is identical).

the RPV is free to use a nominating convention and when a public official can instead compel the Party to use a primary; the Commonwealth has also set a series of parameters within which any nominating convention must be conducted. In light of these circumstances, the RPV's activities are state action that substantially determine the effectiveness of votes cast in the general election.

Clearly, if the Commonwealth of Virginia had itself enacted a statute commanding that only voters who paid a tax of $45 could participate in the RPV's nomination process -- or if the Commonwealth had instead required voters to pay such an exaction to the Party -- that statute would fall within the language of section 5 and require preclearance. If that is so, then the RPV, as the delegee of the Commonwealth's power, is equally covered. The RPV exercises state-delegated power to determine who gains automatic placement on the general election ballot. This feature, standing alone, requires that the Party seek preclearance of changes in whom it permits to participate in exercising that power.

This conclusion is even clearer given the Party's own recognition that its convention is intended to affect voting in the general election. The Party limits the right to participate in its nominating convention to voters who are willing if requested to declare "their intent to support all of its nominees for public office in the ensuing election," J.A. 29, 61. A voter who both wishes to participate in the convention and to comply with his or her declaration has clearly had his or her right to vote affected by the RPV's process.

In addition, the Party's own description of its nomination process recognizes that it involves the right to vote. The Party's Plan of Organization -- its governing

document[15] -- requires that participants at the state party nominating convention be "*elected*" at mass meetings, party canvasses, or local conventions (emphasis added). *See, e.g.*, RPV Party Plan, Art. II, ¶ 22 (J.A. 32); Art. VIII, § A, ¶ 3 (mandating that any prefiling requirement required "for any *election* by a Mass Meeting, Party Canvass, or Convention" be included in the call for that meeting) (J.A. 52) (emphasis added); Art. VIII, § H,¶ 4 (authorizing "the Mass Meeting, Party Canvass, *or* [local] Convention *electing* the delegates" to a state convention to instruct its delegation on specific issues) (J.A. 56) (emphasis added). *See also* Affidavit of David S. Johnson (Executive Director of the RPV), ¶ 5 (J.A. 23). By its own terms, then, the RPV's process involves the election of delegates to a state convention, precisely the behavior that Congress declared in section 14(c)(1)'s definitional provision that the Voting Rights Act was intended to reach.

B. *The RPV's activities fall squarely within the Attorney General's interpretation of the scope of section 5*

The Attorney General, whose long-standing administrative interpretation of section 5 is entitled to "considerable deference," see, e.g., *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178-79; *Dougherty County*, 439 U.S. at 39; *United States v. Sheffield County Board of Commissioners*, 435 U.S. at 131, has consistently construed section 5 to reach political party rules relating to the candidate nomination process. Under 28 C.F.R. § 51.7 (1994), "[a] change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the

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15 *See* J.A. 22.

change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction" such as Virginia. The Attorney General has repeatedly interposed objections to party rules when he has been unable to conclude that the rules had neither a discriminatory purpose nor a discriminatory effect. *See* Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess. 2264, 2271 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General in charge of the Civil Rights Division, reporting on section 5 objections interposed to changes with regard to primary elections and conventions) [hereafter "Turner Appendix"].

The conditions set by § 51.7 are clearly satisfied in this case. The challenged fee has repeatedly been raised without preclearance ever having been obtained. J.A. 18. It is being imposed on persons who wish to participate in the RPV's "public electoral function" of designating a senatorial candidate to appear on the general election ballot. And the RPV is acting under the express authority granted by Va. Code §§ 24.2-509 to 511 in holding a convention to nominate that candidate. The RPV thus must seek preclearance of any changes in its practices under this delegated authority. *See United States v. Sheffield Board of Commissioners*, 435 U.S. at 136; 51 C.F.R. §§ 51.14, 51.15 (1994).

Accordingly, under § 51.23(b), an "appropriate official" of the RPV was required to seek preclearance of the Party's

decision to impose the fee on individuals who wished to participate fully in the nomination of the Party's candidate for United States Senate.[16]

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[16] The promulgation of § 51.23(b) cures the deficiency that led the district court in *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. April 6, 1972), *summarily aff'd*, 409 U.S. 809 (1972), to refuse to require preclearance of the Georgia Democratic Party's rules for electing delegates to the Democratic National Convention. The party rule at issue provided that delegates would be elected at open conventions in each of Georgia congressional districts at which "any resident ... who subscribed to the principles of the Democratic Party" could participate. Slip op. at 2.

The district court in *Williams* was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard," slip op. at 4, for precisely the reasons that we have set out above. But the *Williams* court reluctantly concluded, in "the absence of any procedure for submitting changes in party rules under Section 5," that section 5 preclearance could not be required since "[t]he State Party cannot force the State to seek approval for the party's rules and regulations." Slip op. at 5. It was "under *these* circumstances" that *Williams* concluded that section 5 did not apply. Slip op. at 6 (emphasis added). Subsequently, the Attorney General created the submission mechanism of § 51.23(b), which eliminates the entire rationale for *Williams'* holding, and district courts that have subsequently addressed the issue have required preclearance of internal party rules even when those rules do not involve primaries. *See, e.g., Hawthorne v. Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990) (three-judge court) (requiring preclearance of internal Alabama Democratic Party rules eliminating the right of certain organizations *to appoint* members of state and county party committees); *Fortune v. Kings County Democratic County Committee*, 598 F. Supp. 761, 765 (E.D.N.Y. 1984) (three-judge court) (finding that the defendant was performing a "public electoral function" in deciding who would appear on the general election ballot and thus requiring preclearance of a party rule permitting committee members *who had been appointed* to participate in decisions to fill vacancies in nominations for public office -- e.g., when a candidate died after being nominated).

In any event, this Court having noted probable jurisdiction, the summary affirmance in *Williams* carries little precedential weight. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 120-21 (1986); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

C. *Preclearance of the RPV's decision to hold a nominating convention and to limit delegate eligibility to persons who paid a filing fee is compelled by this Court's decisions in* Presley v. Etowah County Commission, Dougherty County Board of Education v. White, *and* Allen v. State Board of Elections

In *Presley v. Etowah County Commission*, 502 U.S. at 502, 509 (emphasis added), this Court reiterated "[t]he principle that § 5 covers voting changes over a wide range" and "reaffirm[ed] ... that *every* change in rules governing voting must be precleared." *See also Dougherty County Board of Education v. White*, 439 U.S. at 38; *NAACP v. Hampton County Election Commission*, 470 U.S. at 176; *United States v. Sheffield Board of Commissioners*, 435 U.S. at 122; *Allen v. State Board of Elections*, 393 U.S. at 567.

Presley identified four categories of changes subject to preclearance:

> First, we have held that § 5 applies to cases like *Allen v. State Board of Elections* itself, in which the changes involved the manner of voting.... Second, we have held that § 5 applies to cases like *Whitley v. Williams*, which involve candidacy requirements and qualifications. See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985) (change in filing deadline); *Hadnott v. Amos*, 394 U.S. 358 (1969) (same); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32 (1978) (rule requiring board of education members to take unpaid leave of absence while campaigning for office). Third, we have applied § 5 to cases like *Fairley v. Patterson*, which concerned changes in the composition of the electorate that may vote for

> candidates for a given office.... Fourth, we have made clear that § 5 applies to changes, like the one in *Bunton v. Patterson*, affecting the creation or abolition of an elective office.

Presley, 502 U.S. at 501.[17] The last three of these "four typologies," *id.* at 502 are all implicated in this case.

First, according to the RPV's own characterization of the $45 delegate filing fee, the fee falls squarely within the category of "candidacy requirements and qualifications." *Dougherty County Board of Education v. White*, 439 U.S. at 41-43, held that section 5 covers changes in the qualifications required for candidates for public office. In particular, a decision to impose, or raise, filing fees is a change requiring preclearance. *See id.* at 40-41; *see also* H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 18 (1981) (identifying filing fees as a part of the electoral process covered by § 5); Turner Appendix at 2252, 2253, 2256 (reporting Department of Justice objections under § 5 to filing fees). *Cf. Bullock v. Carter*, 405 U.S. 134, 144 (1972) (filing fees can restrict the field of candidates and thus "ten[d] to deny some voters the opportunity to vote for a candidate of their choosing").

By its express terms, the Voting Rights Act applies to candidates for "party office," like convention delegates, as well as to public offices. Voting Rights Act § 14(c)(1). The RPV's Plan of Organization expressly provides that delegates to the nominating convention be "*elected*" at mass meetings, party canvasses, or local conventions. *See supra* p. 26. By its own terms, then, the RPV's process involves the election of delegates to a state convention, precisely the behavior that Congress declared 14(c)(1) was intended to reach. And by

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17 *Whitley*, *Fairley*, and *Bunton* were the three companion cases decided along with *Allen*.

limiting the pool of delegates to those voters willing and able to pay $45, the RPV has certainly imposed a qualification analogous to the qualification at issue in *Dougherty County Board of Education*. Similarly, the Party's promulgation of a deadline for filing as a delegate brings this case within the analysis of *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985), and *Hadnott v. Amos*, 394 U.S. 358 (1969).

Second, despite the RPV's characterization of the $45 fee as a delegate filing fee, the fee actually changes "the composition of the electorate that may vote for candidates for a given office." As we have already explained, the RPV in reality allows any voter who pays the $45 fee to attend the convention and cast a vote on whom the Party should nominate. The fee, however, excludes from the electorate -- both directly at the convention and indirectly under the analysis laid out in *Classic*, *Smith* and *Terry* at the general election -- individuals who are unwilling or unable to pay the fee.

Third, the RPV's decision not to hold a primary, but rather to hold a nominating convention and impose a $45 fee to participate fully, involved the "abolition of an elective office." In 1990, the Party decided to conduct a primary to determine its nominee for United States Senator. Under Virginia law, that primary would have been open to all voters. *See* Va. Code § 24.2-530. No voter would have been required to pay a fee to participate. Nor would a voter have had to travel to, or incur the expenses of, a weekend-long convention in order to have his or her say in the choice of nominee. In 1994, by contrast, the Party abolished the primary election to fill the position of Republican nominee for United States Senator. Thus, the RPV's decision falls within the category identified in *Bunton*. *See also* 28 C.F.R. § 51.13(i).

D. *Because the RPV convention operates as a* de facto *or functional equivalent of a political primary, rules regarding who can participate in the convention are covered by section 5*

Finally, as a *de facto* matter, the RPV's convention itself involved voting. As the RPV's process actually operated, every voter who was willing to pledge his or her support to the Party's nominee and to pay the filing fee was entitled to be certified as a "delegate." Every voter who showed up at the convention was entitled to vote for the candidate of his or her choice. The "filing fee" was simply the cost of voting -- the functional equivalent of a poll tax. The county caucuses were a simple pass-through to the state convention. Under these circumstances, the imposition of the $45 fee as a precondition to casting a vote for a nominee for public office constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

Voting at the Republican state convention was not like voting in a private club or voting for members of the All-Star team, *see Chisom v. Roemer*, 111 S.Ct. at 2372 (Scalia, J., dissenting). Instead, it was in every respect part of the electoral process regulated by the Voting Rights Act. Whatever the formal nature of the RPV's nominating process, the Party in fact conducted the functional equivalent of a primary, as appellants alleged in their complaint, J.A. 6. *See also* Atkinson, *supra* at 343 (describing the RPV's 1978 senatorial nominating convention as a "great indoor primary"); *cf. Allen v. State Board of Elections*, 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part) (concluding that "since the Voting Rights Act explicitly covers 'primary' elections" and the petition process for independent candidates was "the functional equivalent of the political primary" it too should be covered by section 5).

The RPV's decision to call its selection mechanism a "convention" rather than a "primary" is no different from the decision of the Texas Jaybirds in *Terry* not to call their nomination process a "primary." *Terry* establishes that the constitutional guarantee of equality in voting cannot be evaded by verbal quibbling over what a party calls its nominating event.

III. AFFIRMANCE OF THE DISTRICT COURT'S DECISION WOULD RESURRECT PRECISELY THE DANGERS THAT MOTIVATED PASSAGE OF SECTION 5

As this Court explained in *McCain v. Lybrand*, 465 U.S. 236 (1984):

> "The Voting Rights Act ... was enacted by Congress as a response to the unremitting and ingenious defiance of the command of the Fifteenth Amendment for nearly a century by state officials in certain parts of the Nation. Congress concluded that case-by-case litigation ... was an unsatisfactory method to uncover and remedy the systematic discriminatory election practices in certain areas: such lawsuits were too onerous and ... even successful lawsuits too often merely resulted in a change in methods of discrimination. Congress decided to shift the advantage of time and inertia from the perpetrators of the evil to its victims, and enacted stringent new remedies designed to banish the blight of racial discrimination in voting once and for all."

Id. at 243-44 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

The rationale advanced by the RPV and subscribed to by the district court would create a huge loophole in the fabric of section 5. It would enable states to circumvent the Act's guarantees by turning over control of the process to private parties, in clear contradiction of the holdings of *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948), and *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949), on which Justice Black relied in *Terry v. Adams*. *See* 345 U.S. at 465-66. *See United States v. Sheffield Board of Commissioners*, 435 U.S. at 125 (rejecting the argument that cities within a covered state were not required to submit electoral changes if they did not themselves perform voter registration activities because that "would invite States to circumvent the Act ... by allowing local entities that do not conduct voter registration to control critical aspects of the electoral process. The clear consequence of this interpretation would be to nullify both § 5 and the Act in a large number of its potential applications"); *cf. Lebron v. National Railroad Passenger Corp.*, No. 93-1525, slip op. at ___ (Feb. 21, 1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson*, 163 U.S. 537 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak.").

The change being challenged in this case provides a signal example of how the decision of the district court would undercut the key constitutional and statutory protections that section 5 is intended to safeguard. Since 1965, the RPV has increased the fee for participating in its nomination process to $45 -- a charge far higher, even in constant dollar terms, than the $1.50 Virginia poll tax that the Twenty-Fourth Amendment, section 10 of the Voting Rights Act, and *Harper* struck down. Congress' war against the poll tax was

intended to combat several injustices:

> One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise....The poll tax was also attacked as a vehicle for fraud which could be manipulated by political machines by financing block payments of the tax. In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner.

Forssenius, 380 U.S. at 539-40. The revival of each of those injustices is threatened by the decision of the district court.

First, the $45 fee clearly exacts a price on citizens who wish to participate fully in the franchise. Moreover, that price is so high that many voters may be deterred from participating at all. *See* J.A. 9.

Second, the existence of the fee may give rise to vote buying efforts by candidates who pay the fee for voters who agree to support them at the convention. The Oliver North for U.S. Senate Committee engaged in precisely this kind of behavior. *See* J.A. 7-8. *Cf.* Frederic D. Ogden, The Poll Tax in the South 3 n.5, 49-50, 92-95 (1958) (discussing the longstanding Virginia practice of candidates' block payment of the poll taxes of their supporters).

Third, the district court's decision in this case would give a political party *carte blanche* to discriminate within its nomination process. As long as it called its process a "convention," a party could impose fees on citizens who wished to participate, even if the purpose or effect was to deny nonwhite citizens an opportunity to participate. Even facially discriminatory measures -- like requiring blacks to

pay higher fees than whites -- would be exempt from the preclearance process. *Cf. Baskin v. Brown*, 174 F.2d at 392 (one of the discriminatory devices the South Carolina Democratic Party imposed after *Rice v. Elmore* required the party to allow blacks to participate was that "Negroes desiring to vote in the [newly privatized] primaries were required, in addition, to present general election certificates, a requirement not exacted of white voters").

But the potential discriminatory sweep of the district court's exemption of conventions from the Voting Rights Act is even broader. A party could restrict attendance at mass meetings to individuals who own their own homes, even though this might discriminate against minority group members in areas where they are more likely to live in apartments. Similarly, a party could require delegates to its convention to have college degrees even if that would effectively bar members of minority groups from attending. Even overt exclusion -- a rule, for example, barring blacks from serving as delegates -- would elude the preclearance process.

Such absurd and unacceptable results would flout Congress' justifiable determination, in jurisdictions such as Virginia, "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. at 328. Excluded voters would be obligated to bring costly and time-consuming constitutional challenges, and the Department of Justice would be unable to protect voters' rights directly by denying the Party preclearance. Requiring the victims to bring suit to stop such clearly discriminatory practices related to voting would undermine the central purpose of section 5.

IV. Individuals subjected to an illegal poll tax can sue under section 10 of the Voting Rights Act

The enactment of section 10 of the Voting Rights Act of 1965 was neatly bracketed by two decisions by this Court striking down Virginia's use of a poll tax or a "substitute" therefor. *Harman v. Forssenius*, 380 U.S. at 542; *Harper v. State Board of Elections*, *supra*. *Forssenius* squarely confirmed the right of individual citizens to challenge poll taxes directly under the Constitution. 380 U.S. at 533 n. 6.[18] And *Harper* held that such poll taxes violate the Fourteenth Amendment. Section 10 of the Voting Rights Act simply restates the constitutional ban and lays out a procedure for vindicating the constitutional right. A private right of action follows from the language, structure, and legislative history of the Act and an unbroken series of decisions by this Court recognizing individual voters' ability to sue under the Voting Rights Act. Denying a private right of action under section 10 would succeed only in subverting the special procedures in that section for enforcing constitutional rights.

A. *Section 10 reflects Congress' decision to create special procedures for vindicating the constitutional rights declared in section 10(a)*

Section 10 accomplishes three different objects in its three subsections: subsection (a) is a congressional declaration that the constitutional right to vote is violated by a poll tax; subsection (b) gives authority to the Attorney

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[18] Appellants' claims under the Fourteenth and Twenty-Fourth Amendments are currently pending before a single-judge court. *See* J.A. 2-3.

General to sue for declaratory or injunctive relief against a poll tax "or substitute therefor";[19] and subsection (c) grants jurisdiction to three-judge district courts to entertain such actions.

The only consequence of denying a private right of action under section 10 would be to force private citizens to sue directly under the Fourteenth and Twenty-Fourth Amendments. Yet this Court has repeatedly held that when Congress has provided meaningful remedies for the violation of constitutional rights, private individuals must take advantage of those remedies instead of suing directly under the Constitution. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). Denying a private remedy under section 10 would force individuals to bring constitutional claims before a single district judge -- instead of statutory claims before a three-judge district court. It would force that single judge to reach the constitutionality of a poll tax without addressing the statutory issue first.[20] This result is directly contrary to the special procedures for adjudicating poll tax claims established by Congress in section 10.

Section 10(c) establishes a distinctive procedure for

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19 This language echoes the Court's concern in *Forssenius* that states like Virginia would circumvent the Twenty-Fourth Amendment's ban on poll taxes by using "substitutes." *See Forssenius*, 380 U.S. at 542 (under the Twenty-Fourth Amendment, "[f]or federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed").

20 *Cf. City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion) (suggesting that "general principles of judicial administration" require addressing a voter's statutory claim under the Voting Rights Act before addressing his constitutional claims even though section 2, as it then existed, "add[ed] nothing" to the plaintiffs' constitutional claim).

enforcement through adjudication by a three-judge district court. In addition to finding an implied private right of action in *Allen*, this Court also held that private actions under section 5, like public actions under that section, had to be heard before a three-judge district court. 393 U.S. at 561-63. The same is true of actions under section 10. Despite the burden that three-judge district courts placed on the federal judiciary, this Court deferred in *Allen* to the congressional judgment that such courts were "desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration." *Id.* at 561-62. Congress intended three-judge district courts to protect the states, and those acting on their behalf, from the variable decisions of single district judges acting alone. Exactly the same congressional judgment, based on exactly the same concerns, applies to claims under section 10 as to claims under section 5.

If anything, the force of the congressional judgment to require three-judge courts is stronger today than when *Allen* was decided. Most of the provisions for three-judge district courts have since been repealed. *See* Pub. L. 94-381, 90 Stat. 1119 (1976). Claims under section 10 (and other sections) of the Voting Rights Act, however, were specifically exempted from this repeal. H.R. Rep. No. 94-1379, 94th Cong. 2d Sess. 4 (1976); S. Rep. 94-204, 94th Cong. 1st Sess. 9 (1975). To require poll tax claims to be brought by private individuals only before a single judge would therefore contradict a judgment that Congress has made at least twice in favor of three-judge district courts.

This step would also leave the single federal judge without the possibility of avoiding a constitutional decision by relying on statutory grounds. Section 10(b) does not provide for relief that differs significantly from the equitable relief

sought in an individual action under the Constitution. It does, however, reach any claim against a poll tax "or substitute therefor," a phrase which arguably includes required payments such as the registration fee in this case. It makes no sense to construe section 10 so that a single judge must reach a constitutional question when a court of three judges, required by Congress, could decide a case on statutory grounds.

B. *The language and structure of the Voting Rights Act reflect Congress' intent to create a private right of action under section 10*

Section 10 was enacted in 1965, soon after ratification of the Twenty-Fourth Amendment, which prohibits poll taxes in federal elections. Subsection (a) enforces this prohibition and extends it to poll taxes in state elections, an extension that anticipated the decision in *Harper*, which held that all poll taxes violate the Fourteenth Amendment. 383 U.S. at 666.

Section 10 declares that poll taxes are unconstitutional because "the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting." This declaration gives rise, of its own force, to the limited private right of action asserted by the plaintiffs in this case. If this right means anything at all, it means that private individuals are entitled to bring an action to declare a poll tax illegal, to enjoin its continued use, and to obtain a refund of any poll taxes illegally imposed.

By declaring that poll taxes are unconstitutional, section 10(a) makes poll taxes void and thus subject to the usual remedies for void enactments. In *Transamerica Mortgage*

Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), a similar statutory declaration was held to support a claim for limited equitable relief. Section 215 of the Investment Advisers Act of 1940 declares that contracts made or to be performed in violation of the Act are "void" as regards the violator and knowing successors in interest. 15 U.S.C. § 80b-15 (1988). Relying solely on this provision, this Court held that "[a] person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid." *Id.* at 18. What is true of a contract declared void by Congress must also be true of a poll tax declared unconstitutional by Congress. Both are void and both support actions by individual victims for limited equitable relief and restitution. That is all the plaintiffs seek in this case.

The structure of the Voting Rights Act shows that Congress assumed the existence of implied private rights of action under its provisions. Section 12(f), 42 U.S.C. § 1973j(f), grants federal district courts jurisdiction over actions to enforce the statute "without regard to whether *a person* asserting rights under the provisions of subchapte[r] I-A [which includes section 10] ... shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added.) This language is far broader than would have been necessary to cover the Attorney General, who, in any event, faces no need to exhaust administrative remedies.

So, too, section 3, 42 U.S.C. § 1973a, explicitly recognizes that private individuals can sue under the Voting Rights Act to enforce their constitutional rights. The three subsections of section 3 authorize a variety of remedies in cases where "the Attorney General *or an aggrieved person* institutes a proceeding under *any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment*," 42

U.S.C. § 1973a(b) (emphasis added); *accord*, 42 U.S.C. §§ 1973a(a), 1973a(c). Section 10 is clearly such a statute, since it rests directly on the fourteenth and fifteenth amendments. *See* 42 U.S.C. § 1973h(a), (b).

Moreover, the legislative history of section 3 clearly reveals that Congress intended to confirm the existence of implied private actions under the Voting Rights Act. As originally enacted, section 3 provided for special procedures in statutory actions commenced by "the Attorney General." Pub. L. 89-110, § 3, 79 Stat. 437 (1965). In 1975, this phrase was amended to read "the Attorney General or an aggrieved person" to take account of implied private rights of action under the Act, first upheld by this Court in *Allen*. *See Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989). The Senate Report accompanying the 1975 amendment is absolutely clear. Section 3 was amended

> to afford to private parties the same remedies which section 3 now afforded only to the Attorney General.... An "aggrieved person" is any person injured by an act of discrimination. It may be an individual or an organization representing the interests of injured person. In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.

S. Rep. No. 94-295, 94th Cong., 1st Sess. 39-40 (1975).

In section 14(f), 42 U.S.C. § 1973*l*(e), Congress again recognized that private individuals can sue under the same statutory provisions as the Attorney General. Congress provided for the award of attorney's fees to "the prevailing party, other than the United States," in any action "to enforce the voting guarantees of the fourteenth or fifteenth amendment." This provision squarely recognizes the right of private individuals to sue under statutory provisions, like section 10, designed to secure constitutional rights under the Fourteenth and Fifteenth Amendments. And, again, just like the current version of section 3, section 14(f) was added to the statute in 1975. Pub. L. 94-73, § 402, 89 Stat. 404 (1975). Its stated purpose was to encourage actions under the Act by private individuals:

> Such a provision is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights.

S. Rep. 94-295, 94th Cong., 1st Sess. 40 (1975). Just as the Attorney General can sue to enforce voting rights under section 10, but without recovery of attorney's fees, the private individuals who hold those rights can bring suit as well.

C. *An unbroken line of this Court's decisions has found implied private rights of action under the Voting Rights Act*

Soon after enactment of the Voting Rights Act, this Court found an implied private right of action under section 5 of the Act in *Allen*. Section 5, like section 10, explicitly refers only to actions by the Attorney General, yet this Court found an implied private right of action to enjoin changes in voting procedures that had not been precleared with the Attorney General. The reasons grounding that decision have the same force here.

First, *Allen* noted the language in section 5 providing that "no person" should be denied the right to vote by a provision that has not been precleared. 393 U.S. at 555. "Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment" that section 5 preclearance is required. *Id.* Similarly, section 10(a) declares that "the constitutional right of citizens to vote is denied or abridged" by a poll tax.

Second, *Allen* noted that section 12(f) of the Act grants jurisdiction over suits under the Act to district courts "without regard to whether a person asserting rights under the provisions of this Act" has exhausted administrative remedies. 393 U.S. at 555 n.18. Read in tandem with the general voting rights jurisdictional provision, 28 U.S.C. § 1343, the Court suggested that section 12(f) "might be viewed as authorizing private actions." 393 U.S. at 555 n.18. This reasoning applies with equal force to section 10.

Third, *Allen* explained that the Voting Rights Act's specific authorization of suits by the Attorney General was included "to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights."

393 U.S. at 555 n.18. That is clearly true of section 10(b). Nothing in section 10(b) even remotely suggests that Congress intended to make the Attorney General the sole enforcer of a prohibition on poll taxes. On the contrary, section 10(b) itself relies on the power of Congress to enforce the Fourteenth, Fifteenth, and Twenty-Fourth Amendments, all of which refer in their substantive provisions to the rights of "persons" or "citizens."

And fourth, *Allen* declared that "[t]he achievement of the Act's laudable goal could be severely hampered ... if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556. That is as true of actions under section 10 of the Act as it is of those under section 5. The congressional goal of eliminating poll taxes could hardly be accomplished by denying relief under the Act to individuals who have been forced to pay a poll tax. Moreover, in *Allen* as in this case, the Attorney General has recognized the need for private actions to augment her efforts to enforce the statute. 393 U.S. at 557 n.23.

Allen has been followed in innumerable cases brought by private individuals under section 5, such as *Clark v. Roemer*, 500 U.S. 646 (1991). *Allen* has also been extended to allow private actions under other sections of the Voting Rights Act, notably section 2. *E.g.*, *Roberts v. Wamser*, 883 F.2d at 621. Section 2, like section 5 and section 10, explicitly protects "the right of any citizen of the United States to vote." This Court has rendered numerous decisions on the merits of cases brought by private individuals under section 2. *See, e.g.*, *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986). Just as *Allen* has been extended to section 2, so too, it applies to section 10. All three provisions are designed to

enforce the constitutional rights of individual citizens to vote.

D. *Contemporary and longstanding precedent, approved by Congress in amendments to the Voting Rights Act, requires implication of a private right of action*

Congressional intent to create a private right of action must be judged according to the context in which Congress acted. *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). When Congress originally passed the Voting Rights Act in 1965, it acted in a context in which private rights of action were liberally implied. "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself." *Id.* at 718 (Rehnquist, J., concurring) (emphasis in original).

In particular, section 10 was enacted against the backdrop of decisions that recognized a private right of action claiming that poll taxes violated the Constitution and against the backdrop of decisions that consistently found implied private rights of action under federal statutes. This Court's then-recent decision in *Forssenius* had held that private individuals had standing to sue directly under the Constitution to challenge a poll tax. 380 U.S. at 533 n.6. That decision, in turn, was consistent with then-prevailing precedent that liberally recognized implied rights of action under federal statutes. "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964).

In *Cannon*, this Court relied upon decisions from the

same period to find an implied private right of action under a contemporaneously enacted statute, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. Title IX prohibits discrimination on the basis of sex by educational institutions that receive federal funds. It expressly provides only for a cutoff of funds as the means of enforcement. This Court nevertheless found an implied private right of action, relying heavily on *Allen*, but also on the overall approach of prevailing decisions when the statute was enacted. "In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." 441 U.S. at 699.[21]

This Court's decision in *Allen*, rendered in 1969, is compelling evidence of a similar assumption under the Voting Rights Act. Congress explicitly endorsed this assumption in 1975 when it amended section 3 and added section 14(f) to the Act. 42 U.S.C. §§ 1973a, 1973*l*(f). Both of these sections, as we have shown, created special procedures for actions that could be commenced either by the Attorney General, under the express provisions of the statute, or by

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[21] This Court used the same reasoning to find an implied private right of action under the Commodity Exchange Act (CEA), 7 U.S.C. §§ 1 et seq. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). Apart from a narrow provision for arbitration, that statute creates only public remedies for violations of the CEA. Yet this Court found an implied private right of action. "Prior to the comprehensive amendments to the CEA enacted in 1974, the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute." *Id.* at 379. "This Court, as did other federal courts and federal practitioners, simply assumed that the remedy was available." *Id.* at 380.

private individuals, through an implied right of action. *Roberts v. Wamser*, 883 F.2d at 621 & n.12. Both of these sections differed from *Allen* only in recognizing a broader range of implied private rights of action, including actions under section 10, that protect the constitutional right to vote.

Congress has not retreated from its recognition of implied private rights of action in more recent amendments to the Voting Rights Act. On the contrary in 1982, when Congress extensively amended section 2, 42 U.S.C. § 1973, Pub. L. 97-205, 96 Stat. 134 (1982), it made clear its intent to preserve private rights of action under the statute. "Finally, the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. See *Allen v. Board of Elections*, 393 U.S. 544 (1969)." S. Rep. No. 97-417 at 30.

Exactly the same course of judicial and legislative developments -- implication of a private right of action, repeated decisions, and congressional amendment and reenactment -- have been held sufficient to support a private right of action. In *Merrill Lynch*, *supra*, this Court emphasized that Congress had amended the Commodities Exchange Act without disturbing the implied private right of action recognized by judicial decisions. "Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." 456 U.S. at 378-79; *see Cannon*, 441 U.S. at 701-03 (relying on congressional acquiescence in decisions finding an implied private right of action). So, too, in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court held for the first time that section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), created a private right of action. In that case, the Court relied in part on a comprehensive revision of the securities laws in 1975. *See id.* at 384-86. In doing so,

this Court used words that apply equally well to the Voting Rights Act: "Most significantly for present purposes, a private right of action under § 10(b) ... has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." *Id.* at 380.

In sum, section 10, like its constitutional forebears and sections 2 and 5 of the Voting Rights Act, is intended to protect the voting rights of individual citizens. Thus, like these other provisions, section 10 gives rise to a private cause of action by individuals whose rights have been denied.

CONCLUSION

This case represents a dramatic departure from well-settled law about the scope of section 5 and the right of private parties to enforce the Voting Rights Act. Accordingly, this Court should reverse the judgment of the court below.

Respectfully submitted,

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No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW
AND KIMBERLY J. ENDERSON
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND
ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Do the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, apply to voting in elections, as stated in the text of the Act and implementing regulations, and as determined by existing case law, or should those requirements be extended to delegate filing fees and other rules for party political conventions?

2. Does § 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973h, authorizing the Attorney General to institute suit, at his or her discretion, to enjoin those poll taxes in certain areas that meet the criteria specified in that Section, create a private cause of action under the Voting Rights Act?

3. Does a requirement that those offering themselves as candidates for delegate to a state party convention pay a delegate filing fee constitute a "poll tax" within the meaning of the Voting Rights Act?

4. Is this appeal moot where individual plaintiffs have challenged a private political party's filing fee for delegates attending its state nominating convention when the convention has been held and concluded?

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No. 94-203

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APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEES

STATEMENT OF THE CASE

On December 16, 1993, the Republican Party of Virginia ("the Party") issued a call for a state convention to be held on June 3, 1994, to nominate the Party's candidate for United States Senator. Joint Appendix ("J.App.") at 6. Pursuant to the call, all registered voters in accord with the Party's principles and willing if asked to state their intent to support the nominee of the Party were permitted to participate in local mass meetings, canvasses or conventions conducted exclusively by officials of the Party. J.App. at 61. Those who wished to be selected by such methods as delegates to the state convention were required to pay a

registration fee. J.App. at 6. Under the Party rules, election as a delegate is not automatic. Candidates for delegate may be slated off and, even if elected, may be instructed. J.App. at 23. In recent years, the campaign organizations of competing candidates for party nomination have eschewed such tactics as a party unity measure. Hence, for purposes of ruling on a motion to dismiss, the court below accepted Appellants' contention that payment of the fee was tantamount to election.

Appellants, three law students at the University of Virginia Law School (collectively, "the Law Students"), were registered voters of Virginia at the time the call was issued. Appellant Bartholomew alleges that he was deterred from filing as a delegate by the $45.00 fee collected by the Albemarle County Committee. J.App. at 8-9. Appellant Enderson alleges that she was deterred from filing as a delegate in Hampton, Virginia by the $45.00 fee collected in Hampton. J.App. at 9. Appellant Morse paid the fee under complicated circumstances no longer relevant to his claim. J.App. at 6-8.

Five months after the call, and five weeks before the convention was scheduled to be held, the Law Students filed suit seeking an injunction against the delegate selection process. J.App. at 1. The Party timely filed an answer and motion to dismiss under FED. R. CIV. P. 12(b)(6), which the Party supplemented with an affidavit. J.App. at 2. The affidavit established that the Party had decided to nominate its candidate for United States Senate by convention in 1964, 1966, 1970, 1972, 1976, 1978, 1982, 1984, and 1988

(J.App. at 24),[1] and that the delegate fee had increased with time since 1964. *Id.* For purposes of its analysis, the court below found that no fee had been charged in 1964.

After briefing and argument, the three-judge court convened pursuant to the Voting Rights Act denied the Law Students' motion for a preliminary injunction and granted the Party's motion to dismiss the Voting Rights Act claims, holding that § 5 of the Act applies to voting in elections, and not to delegate selection rules, and that § 10 of the Act does not support a private right of action. The three-judge court declined jurisdiction over several claims not made under the Voting Rights Act, leaving the plaintiffs free to pursue such claims before a single judge if they were so advised. Instead Law Students have obtained a stay of those claims. J.App. at 3. This appeal followed.

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[1] The Party's Central Committee filled vacancies in 1964 when the convention refused to oppose Sen. Harry F. Byrd, and in 1978 when the convention's nominee was killed in a plane crash. A primary planned in 1990 was cancelled when no opposition candidate came forward. J.App. at 24. The nomination for the seat involved in this case has always been filled by convention or by the Central Committee (1964, 1970, 1976, 1982, 1988 and 1994).

SUMMARY OF ARGUMENT

If this Court construes the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* (1988), in light of its own clear language, the Court below must be affirmed. The thrust of the argument of the Law Students, and of the United States as amicus, is that policy reasons exist which should lead this Court to disregard the clear language of the statute. However, those policy arguments are based upon a misapprehension of what this case involves and what it does not.

Despite the Law Students' heavy reliance on *Smith v. Allwright*, 321 U.S. 649 (1944), and related cases, this is not a case about racial discrimination. No argument is made that the Party has engaged in any discrimination in the past or intends to engage in discrimination in the future. In fact, in framing their metaphorical argument that the Party's convention is really a primary, the Law Students argue that the Party has been over-inclusive by not implementing practices permitted by its rules to exclude convention delegates.

This case is also not about any requirement to preclear changes in methods of conducting nominations. This issue has been tacitly raised on appeal by the Law Students, and is argued by the NAACP as amicus, but was not advanced, argued, litigated or decided below. The Party's nomination for the Senate seat involved in the present controversy has not been filled by primary at any time since the enactment of the Voting Rights Act.

What this case is truly about from a policy standpoint is whether a forced, unnatural and impractical construction

of the Voting Rights Act will be adopted. In arguing that preclearance applies to party conventions, the Law Students advance a totally infeasible construction of the Voting Rights Act. The practical effect of requiring any preclearance of convention rules and practices would be to require preclearance of all of them, there being no principled distinction between rules relating to the delegate fee and the internal rules of a convention. There is no means to separate the Party's activities into those that are "nomination-related" (*see* Brief of the United States at 20) and those that are not.

The Party's essential purpose and goal is to shape public policy through the election of candidates to public office. The construction of the Voting Rights Act sought by the Law Students would be tantamount to a rule forbidding conventions because conventions adopt their own rules when they convene, and there is therefore no practical methodology for preclearance by the government. The response of the United States that political parties must simply reorganize themselves to facilitate governmental regulation of internal decisionmaking is extraordinarily insensitive to core rights of political association. The claim that government can force such reorganization would be unconstitutional beyond question if such a power were to be claimed by a state. Appellants offer no principled explanation why First Amendment rights should be disregarded here to accomplish an unprecedented intrusion into the right of political association.

Of course, from a practical standpoint, the sheer number of mass meetings and conventions in every subdivision of the Commonwealth would make preclearance of times, places and rules for each election cycle unworkable. Moreover, the interpretation advocated by the

Law Students and the United States would not only thrust the federal government directly into the sensitive areas of freedom of speech and political association in violation of the cautions in *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)(*per curiam*), but would necessarily lead to the unedifying spectacle of the political conventions of one party being subject to the veto of the partisan political appointees of the other. Given the continuation of our two-party system, this would occur in approximately half of the instances of preclearance. There is no necessary construction of the Voting Rights Act that mandates such a perverse result. By adopting the Law Students' construction of § 5, 42 U.S.C. § 1973c (1988), the Court would be drawn into a long and convoluted process of defining the limits of prior restraint on associational rights. The Court should reject any unnecessary construction of the Voting Rights Act which raises such grave constitutional questions.

The outlook reflected in the arguments of the Law Students and the United States is that the right of free political association should be regulated for fear that it might be misused in the future. Without preclearance the Party might engage in racial discrimination in the future, it is said. There are societies, of course, which do limit and regulate such fundamental rights as speech, travel and association for fear that they will be misused. Our traditions, however, are wholly to the contrary and stand as a firm impediment to ignoring the plain language of the Voting Rights Act in order to advance a policy of prophylactic regulation of fundamental rights.

There is no evidence that Congress intended to trench on such rights. Section 5 of the Act itself reaches certain states and their political subdivisions. It also reaches primary

elections because the conduct of elections is a traditional state function which remains public even when delegated to a party. There is no state function in conducting conventions or in nominating candidates. Indeed, states do not and may not undertake such functions. Thus, this is not a case about the exercise of public electoral functions delegated to a political party. There are statutes in the Commonwealth of Virginia that purport to regulate the timing of nominating conventions. There are statutes which presume that established parties have sufficient public support to warrant ballot placement without the necessity of circulating petitions. However, there is no law which delegates state functions to Party conventions and there is no state action implicated in this case sufficient to invoke the preclearance requirements of the Voting Rights Act.

Section 5 of the Voting Rights Act applies to actions by a state or its political subdivisions affecting voting in an election. Section 5 is extended by regulation to the activities of a political party if the party is performing a public electoral function delegated by a covered jurisdiction. Even in the broader context of constitutional state action, the litigant seeking to show that a private party is engaged in state action must prove the nexus between the state and the challenged *action*, and cannot rely on the relationship between the state and private actor. The action challenged here, the promulgation of rules for a party convention, has never been a state function, unlike the conducting of primary and general elections. Hence, the required nexus is lacking.

Even the cases most heavily relied upon by the Law Students, such as *Smith v. Allwright* and *Terry v. Adams*, 345 U.S. 461 (1953), do not stand for a plenary federal power to regulate the internal activities of political parties. The White

Primary Cases and *Terry v. Adams* stand for the proposition that when a state has been violating the Fifteenth Amendment and resorts to subterfuge to evade federal attempts to curb the violations, the Court has the ability and power to reach the methods of evasion. Moreover, under the facts in those cases, the state had clearly fostered the allegedly "private" discrimination in connection with the election of public officials. Finally, this prong of the analysis of state action through private actors has not been incorporated into 28 C.F.R. § 51.7 (1993), the regulation which purports to reach party activities when the party is discharging a public electoral function under a delegation of state authority. Of course, even if the "fostering" analysis of the White Primary Cases were relevant to the Voting Rights Act, there is no allegation that the state has "fostered" the challenged fee, nor has the election of public officials, as opposed to the mere nomination of candidates, fallen into private hands.

With respect to the poll tax issue, Congress could not have intended for the Voting Rights Act to create a private cause of action to challenge poll taxes in 1965. The Act did not even purport to abolish poll taxes. What it purported to do was to provide the Attorney General of the United States with authority to challenge poll taxes where these were used as subterfuge for invidious racial discrimination. This being the case, the principles applicable to finding an intention on the part of Congress to imply a private right of action simply are not satisfied. Subsequent amendments to the Voting Rights Act have evinced no intention to alter this conclusion.

Because the convention in question has been held, the Law Students' action to enjoin the convention fee is moot.

ARGUMENT

I. THE LAW STUDENTS' PRECLEARANCE CLAIM SEEKS A RADICAL EXTENSION OF THE VOTING RIGHTS ACT THAT GOES BEYOND THE ACT'S EXPRESS TERMS AND IS INCONSISTENT WITH CASE LAW, CONGRESSIONAL INTENT AND PAST PRACTICE.

A. This Case Does Not Involve "Voting" In "Elections" As Those Terms Are Defined In The Voting Rights Act.

The rule of decision in this case can be derived from a simple reference to the definitional provisions of the Voting Rights Act. The Law Students claim that the charging of a filing fee to delegates to the Party's convention is a change affecting voting that requires preclearance under § 5 of the Voting Rights Act. Section 5 requires preclearance of any change by a state or political subdivision of ". . . any voting qualification or prerequisite to voting or standard practice or procedure for voting . . ." that is different from what was in effect on November 1, 1964. 42 U.S.C. § 1973c (1988).

The applicability of § 5 to the Party's filing fee is refuted on the face of the statute. There must be a change in a standard or precondition to voting. "Voting" is defined, in § 14 of the Voting Rights Act, in terms of voting in an election. "Voting" includes " ... all action necessary to make a vote effective in any primary, special or general *election* ...". 42 U.S.C. § 1973*l*(c)(1) (1988) (emphasis added). In the context of the statute, the words "voting" in an "election" obviously bear their usual, ordinary and concrete meanings

and do not encompass more equivocal and metaphorical uses of the terms.

B. Extension Of § 5 Beyond Matters Affecting Voting In A Primary, Special Or General Election Is Not Supported By Case Law, Congressional Intent, Or Past Practice.

Certainly, when Congress wishes to encompass caucuses and conventions within the reach of election laws, it knows how to do so. The conclusion that Congress did not intend for the Voting Rights Act to cover nonprimary nominating processes is strengthened by contrasting the definition of "voting" set forth in 42 U.S.C. § 1973*l*(c)(1) (1988) with the definitions used in other federal election laws. In the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, for instance, Congress defined the term "election" when used in the Act to mean:

> (A) a general, special, primary, or runoff election;
>
> (B) *a convention or caucus of a political party which has authority to nominate a candidate*;
>
> (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
>
> (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

2 U.S.C. § 431(1) (1988) (emphasis added).

Congress has also recognized the same distinction between general, special and primary elections, on the one hand, and party conventions and caucuses held for purposes of nominating candidates, on the other hand, in 18 U.S.C. § 601(b)(2) (1988), which prohibits certain corrupt political practices. A similar distinction is made in 18 U.S.C. § 600 (1988). In both cases, Congress has specifically recognized political party nominating caucuses and conventions as activities distinct from general, special and primary elections.

In short, Congress is a body whose members are intimately familiar with the difference between primary and nonprimary nominating processes. They know how to make a statute applicable to political party nominating caucuses and conventions, if that is their intention. Section 5 of the Voting Rights Act, unlike the other election and campaign regulatory provisions cited above, has not been made applicable to nonprimary nominating processes.[2]

This Court has recently emphasized the focused and limited application of § 5 of the Voting Rights Act with its provisions being firmly tethered to voting in elections. In *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992), the Court held that the Voting Rights Act is not an

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[2] The Law Students state that Congressman Bingham thought the Voting Rights Act would cover caucuses. Brief of Appellants at 21. *But cf.* Conf. Rep. No. 711, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2578, 2582 ("Section 14(c)(1) of the House bill includes as part of the definition of 'vote', whereas the Senate bill does not, voting *in elections* for candidates for 'party' office. The Senate receded and the conference report adopts the House version.")(emphasis added). Furthermore, as the Senate noted in its 1982 amendments to the Voting Rights Act, single comments by an individual do not constitute conclusive history. S. Rep. No. 417, 97th Cong., 2d Sess. (1982), at 129, *reprinted in* 1982 U.S.C.C.A.N., 301.

all-purpose antidiscrimination statute. The Court reviewed its decisions under the Act since *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), and summed them up as revealing "a consistent requirement that changes subject to § 5 pertain only to voting." *Id.* at 502. As to the facts presented in *Presley*, the Court said:

> The . . . Resolution is not a change within any of the categories recognized in *Allen* or our later cases. It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for its does not increase or diminish the number of officials for whom the electorate may vote. Rather, the Common Fund Resolution concerns the internal operations of an elected body.

Id. at 503. No more can be said of the conduct challenged here.

In *Presley*, the Court said that a faithful effort to implement the statute must begin by drawing lines between those governmental decisions that involve voting and those that do not. *Id.* The Court rejected arguments that § 5 covered changes in government operations affecting an elected official's authority, saying such a result would expand the coverage of § 5 well beyond the statutory language and the intent of Congress. *Id.* at 505. The Court continued:

> The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered state illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Id. at 506. If § 5 cannot reach the internal operations of an elected body, there is no reasonable construction of its terms that will support its reaching the internal deliberations of a private body, particularly the decisions of a political party as to who may attend its convention as a delegate.

The court below not only properly relied upon the plain language of the statute, but also followed existing case law, particularly *Williams v. Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972)(three-judge court), *aff'd*, 409 U.S. 809 (1972), holding that § 5 of the Voting Rights Act does not apply to procedures for the selection of convention delegates not involving a primary or other election.

Williams involved a § 5 challenge to new rules promulgated by the Georgia State Democratic Party for selection of delegates to the National Convention in open conventions, replacing a system of appointment by the Party's previous gubernatorial candidate. *Williams*, Slip Op. at 2. The court cited the requirement of § 5 for state action, and the definition of voting in § 14, and concluded that § 5 did not reach the party delegate selection rules. The court held that the scope of § 5's requirement for action of a state or political subdivision is a question of statutory construction separate and apart from the meaning of state action in other contexts. *Williams,* Slip Op. at 5. The court reasoned that

the party's adoption of the rules did not constitute state action as required under § 5. Id. at 5.

The court in *Williams* explicitly considered, even to the extent of quoting, the language in the House Judiciary Committee report on the definition of "voting" in the Voting Rights Act upon which the Law Students now rely:

> Clause (1) of this subsection contains a definition of the term "vote" for the purposes of all sections of the Act. The definition makes it clear that the act extends to all elections - Federal, State, local, primary special or general - and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to election of candidates for "party" offices. Thus, for example, an *election* of delegates to a State party convention would be covered by the Act.

Williams, Slip Op. at 4 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2464)(emphasis added). The court then went on to hold that § 5 of the Act did not reach a change in state party rules for the selection of delegates to the national party convention. *Accord Jefferson v. Quarles*, No. 87-0356-R (E.D. Va. May 27, 1987)(three-judge court)(calling of a party caucus not subject to preclearance under § 5 because not related to voting in an election).[3] *Compare Walters v.*

[3] A copy of this unpublished opinion is being lodged with the Clerk.

Edwards, 396 F. Supp. 808, 815 (E.D. La. 1975)(three-judge court)(party officers elected in primary).

The Law Students' explication of this Court's prior jurisprudence with respect to primary elections is simply inapposite. This case does not involve a primary election. The distinction between a nominating convention and a political primary is fundamental. A primary involves the use and mechanism of the powers of the state. Only a state can conduct elections. Only a state can certify the results of an election. Only the state can place candidates on the public election ballot. On the contrary, conduct of the nominating convention cannot be a state function. The state has no power to nominate candidates. Thus, it cannot delegate that power to political conventions. The State's involvement in the nomination process is neutral.

The Law Students' argument that primary elections and nominating conventions are equivalent depends principally on dicta from the concurring opinion of Judge Pitney in *Newberry v. United States*, 256 U.S. 232, 286 (1926)(Pitney, J., concurring).[4] That the Law Students must resort to such attenuated authority for the central proposition of their case is as eloquent a comment on its weight as can be made here.

The Law Students also argue, Brief for Appellants at 33, that Justice Harlan recognized a practical equivalency

[4] *Newberry* as well as *United States v. Classic*, 313 U.S. 299 (1941), were criminal cases in which the court addressed whether primary elections for congressional offices were subject to Article 1, §§ 2 and 4 of the U.S. Constitution. Unlike *Smith v. Allwright* and *Terry v. Adams*, the cases were not decided under the Fifteenth Amendment, and they can shed no light on the scope of § 5 of the Voting Rights Act.

test in *Allen v. State Bd. of Elections*, 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part), that somehow supports their position here. Justice Harlan's observation that a nominating petition is the functional equivalent of a primary was not expressed in the context of determining whether state functions had been delegated. The issue before the court was whether a state statutory change affecting qualification of independent candidates for the general election was subject to preclearance. Obviously, § 5 coverage of a change in state laws affecting candidacy in a general election, which *Allen* thought to be near the outer limits of § 5 coverage, *Allen*, 393 U.S. at 572, can be no authority for the proposition that § 5 reaches the internal rules of a political party.

The Law Students continue their functional equivalency argument by citing a characterization of the 1978 Party convention as a great indoor primary. Appellants' Brief at 32. Here they simply beg the question. If a convention is not a public electoral function delegated by the state -- as it manifestly is not -- the use of a metaphor which originated in a newspaper column will not make it one.

Contrary to the argument of the United States that nominating activities of political parties have always been regulated under § 5, the actual evidence of any such practice is sparse indeed. It is conceded that the Party has never precleared times or the locations of its conventions or mass meetings, nor the fees used to fund them. The United States has cited but a single example, the 1982 delegate apportionment rules of the Democratic Party of Virginia, as representing a contrary practice. Brief of the United States at 12, n.7.

Isolated instances of preclearance of party rules are not probative of a power to regulate the internal affairs of a political party. Rules not subject to § 5 may well have been submitted out of an abundance of caution or in error. Had the Attorney General been routinely applying § 5 to the types of activities the United States claims are regulated, the evidence of such regulation would be abundant. *Cf.* S. Rep. No. 417 at 10, *reprinted in* 1982 U.S.C.C.A.N. 177, 181 (most frequent preclearance objections involved annexations, at-large elections, majority vote requirements, number of posts, and redistricting of boundary lines); *id.* at 13, *reprinted in* 1982 U.S.C.C.A.N. at 183 (numerous examples of failure to make required filings, none involving political parties).[5]

The Law Students quote from *Perkins v. Mathews*, 400 U.S. 379, 389 (1970), Brief for Appellants at 21, suggesting that the language supports an inference that Congress intended to regulate political parties. Although the quotation from legislative history in *Perkins* does refer to "political party committees," the continuation of the quote is required to understand the context:

> For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly

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[5] Although the Law Students state that the so-called Turner Appendix shows other instances of preclearance of Party rules, the Appendix fails to document any practice of preclearing of convention rules. *See* Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 97th Cong., 1st Sess. 2264, 2271 (1981).

> enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.

Id. Obviously political party committees were not consolidating counties or redrawing election districts. The examples given in *Perkins* all involve governmental action rather than party rules, while the relevant legislative history is replete with references confirming that Congress understood § 5 to apply to instrumentalities of government. *See, e.g.*, S. Rep. No. 417 at 6, *reprinted in* 1982 U.S.C.C.A.N. at 183 ("any change in law"), 7, *reprinted at* 184 ("any new law"). Finally, the changes in *Perkins* were described as affecting "votes" and "voters."

The Law Students cite *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), for the proposition that the Voting Rights Act:

> imposed safeguards against circumvention by states *and political parties* which allegedly had shown themselves prone "to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."

Brief for Appellants at 14-15 (emphasis in original). But the cited case refers only to states, 383 U.S. at 335, and properly so in accordance with the language of § 5.

The additional authorities cited by the United States, Brief of the United States at 11-12, are consistent in requiring a showing of state action to invoke the provisions of § 5 of the Voting Rights Act. *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972)(three-judge court)(*per curiam*), relied on *Williams* in concluding that the Voting Rights Act does not protect an individual's right to participate in local conventions. 343 F. Supp. at 121 n.3. The remaining authority cited by the Law Students and the United States is not to the contrary. *Hawthorne v. Baker*, 750 F. Supp. 1090, 1095 (M.D. Ala. 1990)(three-judge court), *vacated*, 499 U.S. 933 (1991), held that the State Democratic Party was covered by § 5 to the extent it was empowered to conduct primary elections under state law. *Fortune v. Kings County Democratic County Comm.*, 598 F. Supp. 761 (E.D.N.Y. 1984)(three-judge court), held that all election rules for the county executive committee were covered by § 5 because of delegated public electoral functions. *See also Wilson v. N.C. State Bd. of Elections*, 317 F. Supp. 1299, 1302 (M.D.N.C. 1970)(three-judge court)(holding that an intra-party agreement was subject to § 5 when it was given force of law under a state statute).

In contrast, the Law Students' citation of cases dealing with filing fees for candidacy for public office is simply inapposite. Brief for Appellants at 30-31. *Board of Education v. White*, 439 U.S. 32 (1978), involved a regulation by a local school board, as a political subdivision of the state, affecting employees who were candidates for public office. *Id.* at 45, 36. *See also Bullock v. Carter*, 405

U.S. 134, 138 (1972)(filing fee in state primary election). Like "voting", the terms "filing fees", "candidates", and "party office" must all be understood in the context of elections.

Simply put, the Voting Rights Act applies to voting in elections. It has never been applied to the internal rules of party nominating conventions. Even where § 5 reaches the rules of party primary elections, coverage is premised on state involvement or state delegation of public election functions to the political party. 28 C.F.R. § 51.7 (1993).

Thus, the opinion of the Court below that the Voting Rights Act applies to voting in elections but not to convention rules is consistent with the plain language of the statute, the Conference Report and other legislative history, the case law, and prior practice. Would good policy be served by uprooting established understanding and expectations? Decidedly not.

II. THE RULE THAT THE LAW STUDENTS AND THE UNITED STATES CLAIM IS IMPOSED BY THE VOTING RIGHTS ACT WOULD ELIMINATE CONVENTIONS AS A PRACTICAL METHOD OF NOMINATION.

In *Presley v. Etowah County Comm'n*, this Court stated that the Voting Rights Act must be construed in a workable way. 502 U.S. at 506-08. If the filing fee is subject to preclearance, then all substantive rules governing the convention must fall under the same requirement. Yet it is conceptually and practically infeasible to preclear such rules. A convention by its nature has plenary power over its

proceedings. Its rules are not adopted until the convention is convened and the rules are presented and adopted.

The United States asserts the right of the federal government to preclear the time and place of all meetings, canvasses and local conventions leading up to any party convention, as well as to preclear any and all "nomination-related" rules or rules governing apportionment of voting power among delegates. Brief of the United States at 20-22. No practical test could be devised for the objective identification of "nomination-related" rules. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. at 505 (suggested distinction between budget and other actions unworkable).

Further, it is not clear that the Attorney General even has, or will continue to have, the resources to undertake preclearance of all "nomination-related" rules in the 131 units of the Party, the analogous organizations of the Democratic Party of Virginia and other parties, and in the parties in the other states and political subdivisions covered by the Voting Rights Act. *Cf.* S. Rep. No. 417 at 15, *reprinted in* 1982 U.S.C.C.A.N. at 192 ("It is already difficult for the Department to enforce the existing preclearance provisions with limited resources. The Department's burden would be increased dramatically if it were required to review proposed changes from every single state and political subdivision not now covered under Section 5." (citing testimony of Drew Days, July 13, 1981)).

Even if she had such resources, it must be evident that the Party would lack them, particularly at the local level. In that circumstance, the benefits of conventions would be denied to the Party by sheer regulatory weight. Commentators have recognized that nonprimary nominating

methods may be superior to use of a primary. Primaries generally attract small turnouts and may result in nominations being made by a small percentage of the vote. Moreover, primary voters may be unrepresentative of the party's voters. Nonprimary nomination facilitates a nomination strategy based on coalition building. Nonprimary nominations force the party leadership to give attention to maintaining the party's bases of support, and to developing reasonably consistent positions over time. Primaries, in contrast, offer incentives for separate elements of the party to compete rather than to cooperate. Divisive primary contests can fragment a party's support and adversely affect its candidates in the general election. Because primaries make the maintenance of stable party coalitions difficult, they also make party coherence difficult. A. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints On and Protection of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 273-76 (1984).

The interpretation of § 5 proffered by the Law Students is impractical for additional reasons. Although neither the Law Students nor the United States have addressed the opportunities for mischief and invitations to corruption inherent in placing the political activities of one party under the effective control of the partisan appointees of the other, *see Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986)(views of the state to some extent represent the views of the one political party transiently enjoying majority power), such practical concerns must be considered. Furthermore, mere delay in preclearing the waves of rules that must come before the Justice Department as each step in the process leading to state and national conventions takes place can impart advantage to one side and impede the activities of the other. Even innocent problems take on the

overtones of deliberate interference and invite litigation. Contemplation of the administrative difficulties as well as the political shoals to be navigated in such a scheme reinforces the Congressional wisdom in strictly limiting the preclearance responsibilities of political parties to such clear delegations of a public electoral function as primary elections.

The Brief of the United States seeks to overcome the impracticalities of regulating political conventions and preclearance of internal party rules by suggesting that political parties change to adopting rules in advance rather than at the convention. Brief of the United States at 22; *compare* J.App. at 24. To do so, however, would change the whole character of the Republican Party of Virginia from a voluntary association of individuals regulating themselves to an organization controlled by a few. Yet the United States argues that the Party must alter its basic form to facilitate its being regulated by the government. This "solution" directly contradicts this Court's ruling in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 232-33 (1989), that the government cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure any more than it can tell a party that its proposed communication to party members is unwise.

The United States denies that it wishes to regulate core political activities, but it is unrealistic to suppose that nomination-related activities can be isolated from other activities of political parties. *Cf.* Brief of United States, at 21. Every activity of a political party is directed toward influencing public policy principally by means of electing candidates to public office.

Moreover, the United States arrogates to itself the definition of the proper scope of political conventions. Brief of the United States at 20. There is nothing in our history that supports a government limit on the subject matter to which citizens may address their attention. *Buckley v. Valeo*, 424 U.S. 1, 57 (1975)(*per curiam*). Indeed, this Court has ruled that a political party can structure itself internally as it sees fit, and it is not for courts to pass on the wisdom of such arrangements. *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 123-24 (1981). If the practical objections to preclearance can only be addressed through such interference, then they are insurmountable.

III. THE INTERPRETATION OF § 5 OF THE VOTING RIGHTS ACT URGED BY THE LAW STUDENTS SHOULD BE REJECTED TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS BECAUSE THE ACTIVITIES OF POLITICAL PARTIES INVOLVE FUNDAMENTAL RIGHTS OF FREE POLITICAL ASSOCIATION PROTECTED BY THE FIRST AMENDMENT.

The construction of the Voting Rights Act advocated by the Law Students and the United States places the implementation of § 5 on a collision course with this Court's First Amendment jurisprudence concerning associational rights. Yet, there is no need to apply such a construction to § 5 because the language of the statute is plain and unambiguous.

Even if that were not so, the Court should apply the familiar principle that where an otherwise acceptable

construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)(citing many cases). To follow the Law Students' invitation would be to put the Fifteenth Amendment concerns addressed in the Voting Rights Act at cross-purposes with First Amendment associational rights, when in fact the two should be complementary.

The Court's decisions involving associational rights establish that the right of association is a basic constitutional freedom that is closely allied to freedom of speech, and which, like free speech, lies at the foundation of a free society. *Buckley v. Valeo*, 424 U.S. at 25 (citing *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). In view of the fundamental nature of the right to associate, governmental action that may have the effect of curtailing freedom to associate is subject to the closest scrutiny. *Id.* (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)). *See also NAACP v. Button*, 371 U.S. 415, 433 (1963)("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.")

> The First Amendment denies the government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people -- individually as citizens and candidates and collectively as associations and political committees -- who

> must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley v. Valeo, 424 U.S. at 57.

If the Law Students' construction of the Voting Rights Act were valid, this case would necessarily involve the Court in a process of attempting to draw distinctions concerning the reach of the federal government into an area long recognized as involving the most sensitive and protected fundamental political rights of the nation's citizens. Yet, no reason has been presented here to blunt the traditional constitutional protection of associational rights by adopting the forced construction of § 5 sought by the Law Students.

The freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association. *Democratic Party of the U.S.*, 450 U.S. at 122. Government may not regulate this association even if it is argued that the burden imposed on the Party is minor. As this Court has said:

> [E]ven if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the

> ground that they view a particular expression as unwise or irrational.

Id. at 123-24. The Court also rejected a claim from the state that it had authority to regulate the party because of its power to appoint presidential electors, saying:

> Any connection between the process of selecting electors and the means by which political party members in a state associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance.

Id. at 125 n.31. The connection between a senatorial election and the nominating party's delegate selection process is certainly no closer. In *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975), like the present case an intraparty dispute over delegate qualifications, this Court held that the proper forum for an intraparty dispute over which delegates should be seated at the convention is the convention itself.

This Court has repeatedly sustained the right of political association against attempts by states to impose regulations that failed the test of strictest scrutiny. A state cannot compel a party to seat at its convention delegates chosen in violation of party rules. *Cousins v. Wigoda*, 419 U.S. at 491. A political party also has the right to select a standard bearer who best represents the party's ideologies and preferences, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. at 224; the right to endorse candidates, *id.*; the right to protect itself from intrusion by those with adverse political principles, *Ray v. Blair*, 343 U.S. 21, 221-22 (1952); the right to require those who wish

to be candidates to pledge support to the party's nominees, *id.* at 227; the right to choose the method of determining the makeup of a state delegation to the national convention; *Democratic Party of the U.S.*, 450 U.S. at 124; and the right to take internal steps affecting its own process for selecting candidates. *Tashjian v. Republican Party*, 479 U.S. at 224. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. *Id.* at 229-30. *Accord Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975)(en banc), *cert. denied*, 424 U.S. 933 (1976)("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution ... [T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.") In sum, a state cannot justify regulating the internal affairs of a political party without showing that such regulation is necessary to ensure an election that is orderly and fair. *Eu*, 489 U.S. at 233.

Despite these principles, the Law Students and the United States persist in asserting that the Voting Rights Act grants an unfettered right to the federal government to subject the proceedings of the Party to prior restraint. This would represent an unprecedented dimunition of associational rights in order to solve a non-problem.[6]

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[6] There is no basis in any allegation of the Law Students for supposing that the Party desires to engage in any act which would contravene the Voting Rights Act if done by a state. *Cf. Eu*, 489 U.S. at 228 (a party presumably will be motivated by self interest not to engage in actions or speech that are contrary to its interests in political success).

If the Voting Rights Act in fact supported the Law Students' interpretation, there would be grave doubt about its constitutionality. Preclearance would fall into the form of a prior governmental restraint on First Amendment freedoms. The Congress can have had no such intention in enacting § 5, as its purpose was to promote full participation in the franchise.

IV. SECTION 5 OF THE VOTING RIGHTS ACT REQUIRES ACTION BY A STATE OR POLITICAL SUBDIVISION.

The Voting Rights Act when adopted expressly rested upon the enforcement power under the Fifteenth Amendment. P.L. 89-110, 79 Stat. 437 (1965); *South Carolina v. Katzenbach*, 383 U.S. at 325. Consistently with the Fifteenth Amendment, the preclearance provisions of § 5 of the Voting Rights Act apply only to states and their political subdivisions. 42 U.S.C. § 1973c (1988).

The statute itself does not mention political parties. However, the applicable regulations extend preclearance obligations to political parties where they are (1) performing public electoral functions and (2) exercising powers delegated by a covered jurisdiction. 28 C.F.R. § 51.7 (1993). Thus the determination whether preclearance is required depends upon a double showing.

United States v. Board of Commissioners, 435 U.S. 110 (1978), cited by the Law Students to support their claim that the Republican Party is covered by § 5, Brief for Appellants at 26-27, actually addressed the question whether a city was subject to § 5 under the circumstances there

obtaining. *Id.* at 113. There can be little question that a city is a political subdivision of a state. The Court held that Congress intended that all state actors within covered areas be subject to the Act. 435 U.S. at 129.

There is nothing in the case to suggest that its analysis has any applicability to private political associations. The Court's reference to "all entities", 435 U.S. at 118, must be understood in the context of the issue framed by the Court, whether a city could be subject to § 5 even if it conducted no voter registration activity. *Id.* at 113. A political party is not a subdivision or instrumentality of the government. Political party conventions do not exercise general governmental powers and are not a unit of government at all. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 612 (Wilkey, J., concurring in result).

A. The Virginia Statutes Cited By The Law Students Do Not Show The Exercise Of Public Electoral Functions And Delegated State Functions By The Party.

The Law Students' citation of several Virginia statutes utterly fails to establish the kind or level of state action required to subject the Party to regulation under 28 C.F.R. § 51.7 (1993) or the relevant case law. Furthermore, the Virginia statutes cited will not bear the construction advanced by the Law Students. Va. Code Ann. § 24.2-509(A) (Michie 1993 Repl. Vol.) is declaratory of rights a political party has independently of the state. There is no delegation of state power or authority to the party. Va. Code Ann. § 24.2-509(A) is merely prefatory to Va. Code Ann. § 24.2-509(B) (Michie 1993 Repl. Vol.), which purports to grant

incumbents limited rights in the decision concerning nomination methods. The latter provision has no application to the Party's 1994 convention, and moreover is itself susceptible to constitutional criticism. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. at 227.

Va. Code Ann. § 24.2-510 (Michie 1993 Repl. Vol.) sets deadlines for parties to complete their nominating process in order to get their candidate on the general election ballot. Va. Code Ann. § 24.2-511 (Michie 1993 Repl. Vol.) sets the procedure for notifying state officials of the nominees to be placed on the general election ballot.

By no stretch of construction can these statutes be held to constitute a delegation of a public election function when a political party exercises its associational rights in conducting a political convention. The provisions are nondiscriminatory, and apply to all organizations within their terms. The statutes do not purport to delegate a state power of candidate nomination by convention, since that is not and has never been a state function, unlike conducting elections. None of the statues require, restrict or otherwise affect the Party's ability to charge a delegate fee.[7]

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[7] Contrary to the argument of the Law Students, Brief for Appellants at 24, the convention does not perform the "winnowing" function described in *Storer v. Brown*, 415 U.S. 724, 735, *reh'g denied*, 417 U.S. 926 (1974), a non-Voting Rights Act case. Unlike the California law described in *Storer*, nothing in Virginia law prevents an unsuccessful aspirant for nomination at the convention from running in the general election upon compliance with the usual requirements for independent candidates. *Compare* Va. Code Ann. § 24.2-506 (Michie 1993 Repl. Vol.) and Va. Code Ann. § 24.2-520 (Michie 1993 Repl. Vol.).

The Law Students' conclusion that public functions have been delegated can only be reached by the tortured logic of supposing the Party's right to nominate candidates for office somehow devolved from the state, and further by placing upon the cited laws a construction that would render them unconstitutional under the precedents of this Court. *See Tashjian v. Republican Party*, 479 U.S. at 217; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. at 229-30; *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. at 120-24.

In reviewing the Virginia election statutes, the Law Students seek to make much of the allegedly favored position of the party under the law. However, the fact that Virginia offers automatic access to the general election ballot to parties which have demonstrated significant public support is not a delegation of a public electoral function. It is merely a practical accommodation to political reality analogous at best to the grant of a public utility monopoly in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354 (1974), a grant held not to constitute state action. Virginia's laws are garden variety election laws that leave the line between state action and private action intact.

> An election ... is an amalgam of state and private action. Only the state can have an election; only the state can confirm an electoral victory. But these traditional and exclusive functions of the state are neutral. The state calls the election, establishes minimum voter and candidate qualifications and counts the votes. It does not, however, designate candidates or, usually, require anyone else to designate candidates. Indeed,

> it does not even ensure that there will be candidates or voters. It also does not determine the factors that will influence voter choice. The decisions to seek office, to vote, and to adopt one policy rather than another are entirely private. Any other approach to the electoral process would tend to thwart its basic purpose: mirroring the preferences of the majority.

Weisburd, *supra*, at 240-41.

"Automatic" ballot access is a misnomer in any event. The Virginia statutes establish minimum qualifications for candidates. These statutes require that a candidate demonstrate a significant degree of popular support before he or she is placed on the ballot. This is accomplished through requirements for petition signatures, or, as in the case of the Party, through its designation of the candidate as its own, the Party having demonstrated significant levels of popular support in the last election. The only difference is that the nominee of a "political party" that has made the required showing of popular support in past elections is credited with the party's showing. That candidate need not demonstrate the same level of personal support that an independent candidate must. *See* Weisburd, *supra*, at 242.

Virginia does not grant candidates access to the ballot who have failed to demonstrate the required level of popular support. Nor does state law require the Party to field a candidate. The state's recognition of the party's candidate could involve a delegation of state authority only if the Party is unable to demand such recognition anyway. Clearly, this Court has settled beyond question the lack of power of a state

to deny access to any candidate with significant levels of popular support. *American Party v. White*, 415 U.S. 767, 782 and n.14 (1974); *Jeness v. Fortson*, 403 U.S. 431, 441-42 (1971); *Williams v. Rhodes*, 393 U.S. 23, 33 (1968). Statutes granting ballot access merely recognize the state's constitutional obligation. *See* Weisburd, *supra*, at 242-44. Hence, there is no delegation of a public electoral function and § 5 does not apply.

The Republican Party of Virginia is not a political subdivision of the Commonwealth. The Party instead represents an association of citizens dedicated to changing the composition of government in every election. Those decisions under the Fifteenth Amendment upon which the Law Students rely simply have nothing to do with the situation that the Law Students have brought before the Court. Nevertheless, the Court's decisions concerning state action are instructive on the scope of § 5 of the Voting Rights Act.

B. The White Primary Cases And *Terry v. Adams* Do Not Suggest That The Nomination Of Candidates In A Convention Is A Delegated State Function Within The Meaning Of 28 C.F.R. § 51.7 (1993).

Smith v. Allwright, 321 U.S. 649 (1944), was the culmination of a series of cases known as the White Primary Cases in which this Court struck down a series of evasions by state authorities designed to perpetuate racial discrimination in voting. All of the cases were decided on constitutional grounds years before the passage of the Voting Rights Act.

In *Smith v. Allwright*, the Court held that where the primary and general elections are fused into a single instrumentality for the choice of public officers, state delegation of the power to fix the qualifications of primary voters is the delegation of a state function. 321 U.S. at 660. Because the state primary was strictly governed by statute, 321 U.S. at 663, a finding of state action was rendered. *Smith v. Allwright*, of course, did not involve political conventions.

A divided court in *Terry v. Adams*, 345 U.S. 461 (1953), followed *Smith v. Allwright* in holding that a state could not design its electoral apparatus to exclude voters on racial grounds from participation in choosing public officials. Justice Black, joined by Justices Douglas and Burton, found that:

> "[T]he effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely what the Fifteenth Amendment forbids -- strip negroes of every vestige of influence in selecting the officials [in question]..."

345 U.S. at 470. Justice Clark, speaking for a plurality of four Justices, concluded:

> Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play. *Smith v.*

> *Allwright*, *supra*, at 664; *cf. United States v. Classic*, 313 U.S. 299, 324 (1941); *Lane v. Wilson*, 307 U.S. 208, 275 (1939).

Terry v. Adams, 345 U.S. at 484.

The Law Students advance a theory of coverage under § 5 premised on fitting the Party's nominating convention on the Procrustean bed of *Smith v. Allwright* and *Terry v. Adams*. But these cases are not even analogous. The Law Students have as their theme the dual assertions that the Party is an instrumentality of the state and that the White Primary Cases provide the rule of decision for this appeal. But Virginia is not Texas in the days of white supremacy, and the Party's 1994 convention was not a surrogate for the Jaybird primary. A little history is instructive.

Frank B. Atkinson's history of the rise of the Republican Party in Virginia, *The Dynamic Dominion: Realignment and the Rise of Virginia's Republican Party Since 1945* (1992), urged on the Court by the Law Students as authority, demonstrates how inapt the comparisons are. Virginia, like Texas, was historically a one-party state, where winning the Democratic primary was tantamount to election. The poll tax was the cornerstone of the Democratic Byrd organization, which also relied upon discriminatory voter registration practices, and the absent voter law, all vigorously opposed by the small Republican Party, to perpetuate itself. *Id.* at 15-16. Before 1950, the total vote in the Democratic primary exceeded that in the general election. *Id.* at 38. But this ended more than a generation ago. Real two-party competition emerged in the 1950's and blossomed in the 1960's. Atkinson, *supra*, at 39. By 1965, both parties had recognized the importance of the growing

black electorate and were actively courting black support. *Id.* at 153.

At the Republican convention in 1988, the delegates nominated the first black Senatorial candidate of either major party in Virginia, Maurice A. Dawkins. Atkinson, *supra*, at 410-11. While Dawkins was unsuccessful in the general election, his candidacy would serve to refute any notion that the convention has operated in a racially discriminatory manner, had any such charge been made in this case, which it was not. Indeed, Dawkins had been a contender for the Party's nomination for lieutenant governor at the convention in 1985. *Id.* at 442. The Democratic Party nominated black State Senator Douglas L. Wilder for lieutenant governor in 1985. Wilder won the general election and went on to become Governor of Virginia in 1989. *Id.* at 413. Hence, the analogies the Law Students seek to draw are simply fanciful.

Moreover, the statutory language and the language of the implementing regulations make clear that Congress did not legislate to the outer limit of its Fifteenth Amendment power in § 5. *Cf. Williams v. Democratic Party, supra.* Section 5 does not expressly reach state action through political parties or other private actors. Nor are all forms of state action even incorporated into 28 C.F.R. § 51.7 (1993).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court summed up its recent jurisprudence on state action by ostensibly private actors as follows:

> The complaining party must ... show that "there is a sufficiently close nexus between the state and the challenged action of the

> regulated entity so that the regulation of the latter may be fairly treated as that of the state itself...." Second, ... our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.... Third, the required nexus may be present if the private entity has exercised powers which are "traditionally the exclusive prerogative of the State."

Id. at 1004, 1005 (citations omitted).

Thus, the dispositive issue in state action claims is the strength of the link between the state and the specific conduct, not between the state and the actor. In *Rendell-Baker v. Cohn*, 457 U.S. 830, 842 (1982), and *Blum v. Yaretsky*, *supra*, the Court narrowed the public function doctrine to decisions "traditionally the exclusive prerogative of the state". *See also Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 928-29 (1982)(something more than private action pursuant to a state statute is necessary to characterize a party as a state actor).

28 C.F.R. § 51.7 (1993) defines the applicability of § 5's preclearance requirements to political parties. A change affecting voting (*i.e.*, as defined in the Act) made by a political party is subject to preclearance if the change relates to a public electoral function, and the party acts under authority explicitly or implicitly granted by a covered jurisdiction or subunit itself subject to the preclearance requirement of § 5. 28 C.F.R. § 51.7 (1993). The

regulation limits its examples of required preclearance of political party activities to the choosing in *primary elections* of party officials or delegates to party conventions.

The regulation incorporates some of the categories in *Blum v. Yaretsky*, but does not include state action resulting from the exercise of coercive power or fostering or encouragement such that the purportedly private decision must be deemed that of the state. *Smith v. Allwright* and *Terry v. Adams* cannot be fairly understood in isolation from the obvious fostering of discrimination and evasion of constitutional guarantees occurring in a one-party state. These cases do not stand for the radical proposition that parties are exercising delegated state functions whenever parties nominate candidates by convention who will be placed on the general election ballot. In *Smith v. Allwright* and *Terry v. Adams* the state electoral function implicated was the election of public officials and not the nomination of candidates. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 625-26 (1991); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). *See also* Weisburd at 238 ("But nomination, the designation of particular individuals as candidates for particular offices, is not a state function at all, by tradition or otherwise.")

Because no case has held that nominating candidates for office without involvement of the state, and without the fostering of racial discrimination or willful evasion of the Fifteenth Amendment, is state action, the cases upon which the Law Students principally rely have literally nothing to do with this case. Furthermore, even if the Law Students were successful in inserting *Smith* and *Terry* standards into the regulation, it would be of no avail in this case because there is no allegation that Virginia has fostered the fee in question,

Jackson v. Metropolitan Edison Co., 419 U.S. at 358 (must be nexus between state and private action, not merely between state and private actor, for state action to be found in private act), and the fee does not depend upon the delegation of a public electoral function.

V. THE LAW STUDENTS FAILED TO CHALLENGE THE USE OF A CONVENTION TO SELECT THE NOMINEE BELOW AND CANNOT RAISE THIS ISSUE ON APPEAL.

At points in their brief, the Law Students appear to complain that the abortive change from convention to primary in 1990 required preclearance. Brief for Appellants at 31. The NAACP as amicus devotes its entire brief to this point. Because this issue was not raised below, it is not before the Court and the brief of the NAACP becomes moot.[8]

In any event, it is difficult to see why the events of 1990 would affect the Party's entitlement to continue its consistent practice of conventions. The holding of conventions is not a change. The Party's nominees for the Senate seat at issue have never been selected by primary in any period relevant to the Voting Rights Act. J. App. at 11. But in any event, this issue was not pled, briefed, argued or decided in the court below. As a natural and proper result, the lower court's decision does not address it. This Court will not decide a question not raised or addressed in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

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[8] No other private amicus has briefed the § 5 issues raised in this appeal.

VI. BY ITS NATURE, CONTENT AND HISTORY, § 10 OF THE VOTING RIGHTS ACT CANNOT SUPPORT A PRIVATE RIGHT OF ACTION.

A. The Language And Legislative History Of § 10 Do Not Support Implication Of A Private Cause Of Action.

The court below disposed of the Law Students' poll tax claim on the procedural ground that § 10 of the Voting Rights Act, 42 U.S.C. § 1973h (1988), authorized the Attorney General, but not a private citizen, to bring an action before a three-judge court. Although the Law Students vigorously challenge this holding, the conclusion of the lower court was certainly correct. As this Court said twenty-five years ago in *Allen v. State Bd. of Elections*, 393 U.S. at 563, § 10 "... contains a provision authorizing a three-judge court *when the Attorney General brings an action* 'against the enforcement of any requirement of the payment of a poll tax as a precondition to voting ....'" (emphasis added).

The Law Students' claim that there exists a private right of action under § 10 ignores the history of poll tax legislation. The necessary premise of the Law Students' argument is that § 10 outlawed poll taxes. Despite claims to the contrary, it did not. Poll taxes in federal elections were abolished by the Twenty-Fourth Amendment. Poll taxes in state elections were held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment in *Harper v. Board of Elections*, 383 U.S. 663 (1966), *after* the enactment of the Voting Rights Act in 1965.

A review of the enactment of § 10 is instructive. The House Judiciary Committee reported a bill that would have abolished the poll tax in any State or subdivision where it still existed. H.R. Rep. No. 439, *reprinted in* 1965 U.S.C.C.A.N. 2437. But the Report shows that Congress entertained substantial doubt concerning its power to abolish poll taxes by legislation. *See* H.R. Rep. No. 439, 1965 U.S.C.C.A.N. at 2479, 2480 (citing the Attorney General's testimony that Congressional abolition of poll taxes without evidence of specific discriminatory effect raised "the substantial risk of unconstitutionality", and other authorities to the same effect); *see also Harper*, 383 U.S. at 580 n.2 (Harlan, J., dissenting) (citing doubt expressed in Senate hearings on passage of the Voting Rights Act whether state poll taxes validly could be abolished through exercise of Congress' legislative power). In the end, Congress rejected the House bill's flat prohibition and enacted the original § 10. Conf. Rep. No. 711 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2578, 2580.

Section 10 was a narrow compromise authorizing the Attorney General to bring suit where he found that certain conditions were met. This is what the statute says on its face. This is what the legislative history documents. This grant of discretion to a public officer discloses no intent by Congress to create a private right of action.

No finding of a private right of action under § 10 is compelled by this Court's decision in *Allen v. State Bd. of Elections, supra*. *Allen* concerned § 5 of the Act, which the Court held to create substantive rights, but no specific remedy. 393 U.S. at 554-55. Section 10, on the other hand, creates no substantive rights, but explicitly limits its application to certain actions to be filed by the Attorney

General, and has continued to be so limited while other sections of the Act have been amended in recognition of the creation of private rights of action.

The Brief of amici The Lawyers' Committee for Civil Rights under Law and the American Civil Liberties Union effectively concedes that the Party's argument that there was no private cause of action under § 10 in 1965 is troublesome for their position. Brief of the Lawyers' Committee at 18. But both the Lawyers' Committee and the Law Students argue that the 1975 amendments to the Voting Rights Act, P.L. 94-73, 89 Stat. 400, created an implied private right of action under § 10. Brief of the Lawyers' Committee at 18-21 (amendments to § 10); Brief for Appellants at 41-42 (amendments to § 3). These arguments cannot be sustained. The legislative history demonstrates that the amendment to § 3 was limited to extending authority to the courts to grant the special remedies available in actions brought by the Attorney General in actions brought under § 3 by private parties. S. Rep. No. 295, 94th Cong., 1st Sess. (1975) at 49, *reprinted in* 1975 U.S.C.C.A.N. 774, 813. At the same time private claims were recognized in § 3, no change was made in § 10's narrow direction to the Attorney General. *Id.* at 44, 51, *reprinted in* U.S.C.C.A.N. at 811, 818.

Furthermore, claims of implied private causes of action are evaluated upon the intent of Congress when it enacted the statute in question. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984). By 1975 Congress was undoubtedly aware from decisions such as *Cort v. Ash*, 422 U.S. 66 (1975),[9] that such issues were being resolved by a

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[9] *Cort v. Ash* was decided more than a year prior to the enactment of the 1975 amendments to the Voting Rights Act on July 30, 1976.

straightforward inquiry into whether Congress had intended to provide a private cause of action, and Congress would have provided evidence of such intent in later reenactments of the legislation if it intended to create a private right of suit. *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989). This principle applies to the 1975 amendments and with equal or greater force in view of the passage of the Voting Rights Act amendments of 1982, P.L. 97-205, 96 Stat. 131.

A statute that does not ban the poll tax, but instead grants discretion to the Attorney General to selectively attack poll tax provisions obviously does not create a private cause of action to be free of all poll taxes. Whatever rights citizens may have under the Twenty-Fourth Amendment or *Harper*, those claims, as the lower court held, cannot be pursued under the Voting Rights Act but must be asserted in the ordinary fashion before traditional district courts.

Section 10 has been the basis of a claim resulting in a published opinion only twice in the last ten years, once in *East Flatbush Election Comm. v. Cuomo*, 643 F.Supp. 260 (E.D.N.Y. 1986), a challenge to civil court fines as a "poll tax", and in this case below. The court in *East Flatbush Election Comm.* dismissed the claim, which is distinguishable from the claim here in that the challenged fines were at least imposed by the state. Given the lack of topicality for poll tax disputes, it is not surprising that Congress has never evinced an intent to provide a private cause of action under the Voting Rights Act to process such claims through three-judge federal courts.

B. A Delegate Registration Fee At A State Convention Is Not A Poll Tax.

Historically, it is clear what a poll tax is. A poll tax is a head tax imposed by the state. *United States v. Alabama*, 252 F. Supp. 95, 97 (M.D. Ala. 1966). This head tax must be paid before the right of franchise can be enjoyed. *Harper*, 383 U.S. at 664 n.1, 666 n.3. Because of the tendency for states which wished to depress the votes of racial minorities or the non-affluent to require the payment of poll taxes at times or in places which were difficult and inconvenient, *see Harman v. Forssenius*, 380 U.S. 528, 539-40 (1965), poll taxes as a condition for voting were prohibited by the Twenty-fourth Amendment in federal elections and proscribed in state elections by *Harper*'s determination that the right to vote in an election may not be burdened financially.

The payment at issue here is not a poll tax. Not being imposed by the state, it is not a tax at all. Once again, the Law Students fail to distinguish between the government and a private organization.

Indeed, the Party in charging the challenged fee has merely sought to finance its convention through a large number of small contributions rather than relying on a few large contributors. The Court in *Buckley v. Valeo* has already recognized that eliminating this reliance is a vital governmental interest. 424 U.S. at 104. The Court has recognized that contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. *Buckley*, 424 U.S. at 21.

Not being a burden on the right to vote in an election, the fee was not a poll tax. Not being a poll tax, it did not implicate § 10. Being a reasonable device for avoiding excessive reliance on large contributors, the charge was benign as a matter of policy under *Buckley*. Once again, the Law Students confuse legal categories with metaphor. The fact that a delegate filing fee and a poll tax both involve the payment of money hardly permits the former to be redefined into the latter.

VII. THE LAW STUDENTS' CLAIMS CONCERNING THE CONVENTION FILING FEE ARE MOOT BECAUSE THE CONVENTION HAS BEEN HELD AND CONCLUDED.

This Court has consistently held that claims concerning conventions and elections are moot once the activity to which the challenge pertains has been concluded. *Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979); *Cousins v. Wigoda*, 409 U.S. 1201, 1204 (1979)(*per curiam*); *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969)(*per curiam*); *Hall v. Beals*, 396 U.S. 45, 48 (1969)(*per curiam*); *Richardson v. McChesney*, 218 U.S. 487, 492 (1910); *Mills v. Green*, 159 U.S. 651, 657-58 (1895).

The Court on occasion has held that occurrence of the election or convention might not moot a challenge when the matter challenged is "capable of repetition, yet evading review." This exception to mootness applies when (1) the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party

would be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Here it is clear that the issues are capable of litigation in the time permitted. As the court below found, the Law Students delayed five months in bringing the action originally. Jurisdictional Statement Appendix at A-5. Only four months later, the case was decided below and briefed in this Court. A timely challenge can be litigated on its merits in the time available.

Moreover, the Law Students have failed to show that there is any reasonable expectation that they will be subject to the same action in the future. Challenged practices in elections or conventions are deemed likely to recur where they are required by statute or other generally applicable requirement. *See, e.g., Fishman v. Schaffer*, 429 U.S. 1325, 1329 n.4 (1969)(state statute governing access to ballot through nominating petitions); *Democratic Party of U.S.*, 450 U.S. at 115 n.13 (order of state's highest court applicable to future elections); *Anderson v. Celebrezze*, 460 U.S. 780,784 n.3 (1983) (action challenging constitutionality of a state's early filing deadline); *Storer v. Brown*, 415 U.S. at 737 n.8, (action challenging constitutionality of state election laws governing access to ballot for independent candidates); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)(Illinois state nominating petition statute). Here, the Party is not required by any law or rule to impose a fee. Furthermore, there is nothing in the allegations of the Law Students or the facts found by the court below to indicate that the Law Students intend to participate in any future Party convention. In *Brockington v. Rhodes*, *supra*, this Court held that an action challenging the validity of a state statute which required signatures on a nominating petition for an independent

candidate to the United States Congress was rendered moot by the occurrence of the election in which he sought to run. The candidate did not allege that he intended to run for office in any future election, nor did he attempt to maintain a class action on behalf of other putative individual candidates, present or future, or on behalf of other independent voters. *Brockington v. Rhodes*, 396 U.S. at 42-43.

Here, of course, it is unknown whether the Law Students will desire to be delegates in the future, will be charged fees in the future, or, indeed, will be qualified to be delegates at all by residence or party affiliation. Lawsuits should not proceed on hypothetical, abstract or pedagogical interests.

CONCLUSION

The Law Students claim that the federal government has the power to disregard the divide between state action and private political activity, and further claim that the government actually did so in passing the Voting Rights Act. In this the Law Students greatly err. The Voting Rights Act by its terms does not apply to this case. If it did apply in the way urged by the Law Students, administration would be impractical and the Act would violate fundamental rights. Under our laws as consistently construed by this Court, the ruling below should be affirmed.

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No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

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INTRODUCTION

Appellees' position is simple, sweeping, and wrong. They maintain that neither the Constitution nor the Voting Rights Act offers any protection to voters excluded from the process of nominating candidates for federal office as long as a political party takes the semantic precaution of calling its nominating event a "convention." If their argument is taken seriously, then political parties would be left entirely free to bar African Americans or poor people from participating as delegates to a nominating convention, or to charge a higher delegate filing fee to Hispanics, or to bar Native Americans even from attending the caucuses and mass meetings at which delegates are elected.

Appellees (hereafter "the Party" or "RPV") claim that this absurd result is not only a faithful reading of the Voting Rights Act but is constitutionally compelled. First, the RPV claims that the statutory safeguards provided by section 5 of the Voting Rights Act were not intended to reach party nomination activities other than state-administered primary elections. *See* Brief of Appellees at 9-20, 29-40. Second, it asserts that protection of the right to participate in party nomination activities other than primaries would in any event violate the Party's First Amendment rights. *Id.* at 24-29. Third, it contends that preclearance would be unworkable and raises the specter of partisan misconduct by the federal government. *Id.* at 20-24.

Against the breathtaking assertion of immunity advanced by the RPV, appellants make only this modest claim: when a political party performs the public electoral function of selecting a candidate who receives automatic access to the general election ballot, it must seek preclearance of rules that govern who can participate in that nomination process. Nothing in our position would force the RPV to abandon nominating conventions or would infringe the Party's First Amendment rights.

I. SECTION 5 OF THE VOTING RIGHTS ACT REACHES PARTY NOMINATING CONVENTIONS

1. As we pointed out in our opening brief, the Voting Rights Act must be understood in historical context. This Court's decisions from *United States v. Classic*, 313 U.S. 299 (1941), through *Terry v. Adams*, 345 U.S. 461 (1953), established that the right to vote in the general election was impaired by interference with a voter's ability to participate in the process of deciding which candidates should appear on the general election ballot. This was true

regardless of whether the state conducted a primary election, *Classic*, *supra*; the state conducted a primary whose result then had to be ratified by a state party convention, *Smith v. Allwright*, 321 U.S. 649 (1944); or an entirely private political organization conducted a shadow election prior to any state-regulated nomination process, *Terry*, *supra*. *See* Brief for Appellants at 14-20.

Thus, when Congress enacted the Voting Rights Act, it understood that the right to vote in the general election could be substantially denied or abridged if voters were excluded from the party nomination process. Accordingly, the Act expressly protects the right to vote for "candidates for ... party office," Voting Rights Act, § 14(c)(1), 42 U.S.C. § 1973*l*(c)(1); *see also* Voting Rights Act, § 2(b), 42 U.S.C. § 1973(b) (requiring that "the political processes leading to nomination and election" be equally open to all voters).

The definitional language of § 14(c)(1) was added to the Act precisely to reach the selection of convention delegates "through a series of Party caucuses and conventions" because Congress realized that party caucuses and conventions were an integral part of the political process. 111 Cong. Rec. 16273 (July 9, 1965) (statement of Rep. Jonathan B. Bingham, author of the relevant language). *See* Brief for Appellants at 20-21, 23.[1]

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[1] The Party's attempt to explain away Rep. Bingham's statement as the view of a single legislator itself relies only on the views of a single legislator. The page in the 1982 Senate Report to which the RPV refers contains the "additional views" of Sen. Hatch, *not* the views of a majority of the Committee. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. at 129 (1982). To the extent that Sen. Hatch spoke for any other legislator, it was only by incorporating in his remarks a subcommittee report rejected by the full committee.

In any event, what Sen. Hatch criticized -- interpreting the statute

In this case, the Party concedes, as it must, that delegates to its senatorial nominating convention are "elected," *see* J.A. 23, 32, 52, 56, 62; Brief for Appellees at 2, and that the Party has never sought preclearance of any changes in the rules governing this election process (including its repeated decisions to raise the delegate filing fee), *see* J.A. 18, 24; Brief for Appellees 16.[2] Given these

based on a single, "chance" remark, made during a committee hearing, and itself subject to alternative interpretations -- does not apply to Rep. Bingham's statement. Rep. Bingham's statement was made on the floor of the House, not in a committee hearing; it explained statutory language that he proposed, and that was adopted; and it did so in terms that were not ambiguous and were themselves adopted by an authoritative committee report. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464 ("an election of delegates to a State party convention would be covered by the act").

[2] The question whether the Party had to preclear its change from a primary to a convention for selecting its nominee also remains before this Court. The facts on this issue are undisputed and are based on the affidavit of David S. Johnson submitted by the Party itself: in 1990, the Party decided to select its senatorial nominee by primary although none was ever held because no one challenged the Party's incumbent. J.A. 24. At the next senatorial election, in 1994, the Party selected its nominee by convention, without preclearing this change.

Appellants raised this issue at oral argument before the district court, by proffering evidence that "the Republican Party has never pre-cleared any of its changes, including, for example, such changes as deciding to hold a primary election," Transcript of Proceedings at 5. This issue is also fairly presented by appellants' allegation challenging the Party's "imposition of a filing fee for full participation in the processes leading to the nomination of a candidate for United States Senate." J.A. 10. A primary, of course, could not have required such a filing fee, so that a change from a primary without a fee to a convention with a fee is a change that denies full participation in the nominating process.

In any event, no amendment to the pleadings was necessary to conform to the evidence. The RPV has pointed to no prejudice that it would suffer from considering this undisputed fact, and under Federal Rule of Civil

concessions, section 5's preclearance requirement follows automatically.

2. The Party nonetheless argues that because it used a nominating convention, rather than a primary, it was somehow immune from regulation under section 5. *See* Brief for Appellees at 30-40. The Party's argument proceeds from the assumption that the proper question is whether the RPV's decision to hold a nominating convention and charge a $45 fee to attend would violate the Constitution.[3] But that assumption is wrong. The proper question on the claims before this Court is one of statutory interpretation. Moreover, given the "considerable deference" to which the Attorney General's interpretation of section 5 is entitled, *see, e.g., NAACP v. Hampton County*, 470 U.S. 166, 178-79 (1985); *Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978); *United States v. Sheffield Board of Commissioners*, 438 U.S. 110, 131 (1978), the question can best be phrased in these terms: does the RPV's imposition of a $45 fee to participate in its nomination process fall within the ambit of section 5 as construed by 28 C.F.R. § 51.7?

Section 51.7 requires political parties to seek preclearance of changes in their rules "(a) if the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction." Contrary to the RPV's suggestion, the question is *not* whether the Party makes its

Procedure 15(b), pleadings may be amended at any time, "even after judgment," to conform to the evidence, "but failure so to amend does not affect the result of the trial of these issues."

[3] This question is presented by the first and second counts of appellants' complaint, which claim that the Party's $45 fee violates the equal protection clause and the Twenty-Fourth Amendment, *see* J.A. 9, but those claims are not now before this Court, *see id.* at 3.

selection using a public election (i.e., a primary); rather the question is whether the Party's activity is "an integral part" of the electoral process that culminates in the popular election of a Senator. *See Classic*, 313 U.S. at 314; *Smith*, 321 U.S. at 661; *Terry*, 345 U.S. at 469 (Black, J.).

Nor is it necessary for appellants to show "the fostering of racial discrimination or willful evasion of the Fifteenth Amendment" through the use of a $45 fee, as the RPV contends. Brief for Appellees at 39. The presence of such a discriminatory purpose would be critical if this were a Fifteenth Amendment case. But this is a section 5 coverage proceeding and the *only* question before this Court is whether imposing such a fee affects voting, *not* whether it reflects a discriminatory purpose or effect. *See, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. at 181 ("it is not our province, nor that of the [local] District Court below, to determine whether the changes ... in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia"); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971) (same). Indeed, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the challenged change was an ostensible *liberalization* of Virginia's regulations for casting write-in votes, yet preclearance was required. Given Virginia's history of discriminatory wealth-based restrictions on the right to participate in the political process, *see Harper v. State Board of Elections*, 383 U.S. 663 (1966), *Harman v. Forssenius*, 380 U.S. 528 (1965), there is clearly a potential for discrimination affecting the right to vote in conditioning participation on payment of the $45 fee.

3. Of course, the RPV -- like any other organization in Virginia -- has an inherent right to meet and agree upon a candidate to support in the general election.

But the RPV's convention is not just another meeting. Rather, its function is to produce a nominee who, by virtue of the Party's standing under Va. Code § 24.2-101, is placed on the general election ballot automatically, *id.* § 24-2.511, and in a preferential position, *id.* § 24.2-613 (providing that the names of nominees of political parties are to be placed on the ballot before the names of independent candidates).

Thus, contrary to the contention of the Attorney General of Virginia, this case does not concern the rights of political parties generally. This case concerns the state-created privileges of only certain select political parties, as defined specially by Virginia Code § 24.2-101. As the Attorney General states: "For parties meeting the statutory definition, ballot access is automatic." Brief Amicus Curiae of the Commonwealth of Virginia in Support of Appellees at 15. The automatic access that follows from meeting this special statutory definition does not arise from any natural or constitutional rights to political participation, as the Attorney General seems to contend. It arises directly and immediately from a Virginia statute. If that statute were repealed, the delegated function of choosing a nominee with automatic access to the ballot -- or of making certain that candidates possess the requisite amount of popular support to justify placement on the general election ballot -- would again revert to the state.

Under Va. Code § 24.2-509(B), the Commonwealth sometimes grants authority to a public official -- an incumbent senator from a political party -- to decide whether to hold a primary or nominating convention; in the absence of a public officeholder, control over the choice is granted to

party officials instead.[4] In the event the decision to hold a nominating convention is made by an incumbent senator, by virtue of his position as a government official, the Commonwealth's grant of authority, and the requisite state action, is particularly clear. But nothing turns on the fortuity that on this particular occasion the choice was made by party officeholders instead.

The RPV is free to conduct its nominations using mechanisms not authorized by Virginia law, but if it does, it must seek placement of its nominees on the general election ballot as independents. Thus, when the RPV conducts a convention to select a candidate for United States Senator who will appear on the general election ballot as the nominee of a political party, the rules the party uses to determine who can participate in that process fall within the scope of 28 C.F.R. § 51.7 and section 5 of the Voting Rights Act.

4. This Court's recent decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), confirms these principles. *Presley* made clear that every change that has "a direct relation to voting and the election process" requires preclearance. *Id.* at 503. In particular, section 5 covers "candidacy requirements and qualifications," the "composition of the electorate that may vote for candidates for a given office," and the "abolition of an elective office." *Id.* at 502-03. As we explained in our opening brief, these are the types of changes implicated in this case. Brief for Appellants at 29-31. Contrary to the RPV's assertions,

[4] The RPV's suggestion that Virginia lacks the authority to dictate the nomination procedure parties must use in order to receive automatic ballot access, Brief for Appellees at 31, is simply incorrect. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (noting that it is "too plain for argument" that a state can insist that parties with automatic ballot access use either primaries or conventions to nominate candidates); *Storer v. Brown*, 415 U.S. 724, 735 (1978) (same).

Presley's holding -- that "changes 'with respect to governance'" do not require preclearance, 502 U.S. at 510 -- has nothing to do with this case. Section 5 clearly does not reach such party "governance" decisions as "the conduct of political campaigns, and the drafting of party platforms," 28 C.F.R. § 51.7. But this case concerns only the right of qualified voters to participate fully in the nomination of a candidate for public office. Unlike *Presley*, this case does not involve any change in governance.[5]

II. Applying Section 5 to Political Party Conventions Poses No First Amendment Difficulties

1. This Court has firmly and repeatedly rejected the argument that political parties have a First Amendment right to exclude voters on the basis of race. *See Smith v. Allwright*, *supra*; *Terry v. Adams*, *supra*; *San Francisco Democratic Central Committee v. Eu*, 489 U.S. 214, 232 (1989); Brief for the United States at 23-24. To hold otherwise, as the RPV argues, would require this Court effectively to overrule *Terry v. Adams*, and to hold that as long as a political organization is not participating in a state-

[5] The Party's reliance on *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. Apr. 6, 1972) (three-judge court), *aff'd*, 409 U.S. 809 (1972), is equally misplaced, as we explained in our opening brief. *See* Brief for Appellants at 28. The Party's reliance on an unreported oral decision by a three-judge court in Virginia, *Jefferson v. Quarles*, No. 87-0356-R (E.D. Va. May 27, 1987), adds nothing to their argument. Although two of the judges in *Jefferson* also sat on the three-judge court in this case, *Jefferson* was not cited in the opinion below. In any event, the analysis in *Jefferson* -- which involved a challenge to the decision of a party incumbent who had been nominated through a primary to require the use of a party caucus instead -- was clearly rejected by *Presley*, which reaffirmed the requirement that a decision to abandon elections must be precleared. 502 U.S. at 502.

sponsored and -regulated primary, it has a constitutional right to exclude black voters.

The RPV tries to sidestep this unpalatable position by claiming that this case does not involve allegations of willful racial discrimination: "There is no basis in any allegation of the Law Students for supposing that the Party desires to engage in any act which would contravene the Voting Rights Act if done by a State." Brief for Appellees at 28 n. 6. The RPV is simply wrong. If the Commonwealth were to impose a $45 fee on all voters who wished to participate in the nomination process without first obtaining preclearance, it would most certainly violate section 5. Like any other poll tax or filing fee, such a charge would clearly pose the "potential for discrimination," *Dougherty County Board of Education v. White*, 432 U.S. at 42. And given Virginia's history of discriminatory, wealth-based restrictions on the right to participate in the political process, *see Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Harman v. Forssenius*, 380 U.S. 528 (1965), it beggars belief to suppose that the Attorney General or the United States District Court for the District of Columbia would find that the imposition of a fee roughly four times larger (adjusted for inflation) than the tax invalidated in *Harper*[6] has neither a discriminatory purpose nor a discriminatory effect.

Nor can the white primary cases be distinguished on the ground that racial discrimination is "so fundamentally repugnant to the value embodies by, and the rights protected by, the United States Constitution" that it is unlike any other form of exclusion from the political process. Brief Amicus Curiae of the Commonwealth of Virginia in Support of Appellees at 21. After the ratification of the Twenty-Fourth

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[6] *See* U.S. Dep't of Commerce, Statistical Abstract of the United States 481 (113th ed. 1993).

Amendment and this Court's decisions in *Harper* and *Bullock v. Carter*, 405 U.S. 124 (1972), requiring the payment of a fee to participate in the electoral process is equally repugnant to the Constitution. What is state action for purposes of prohibited racial discrimination also constitutes state action for purposes of financial restrictions on participation in the electoral process.

In any event, the RPV has never argued that its ability to charge voters $45 to participate in its nomination processes is integral to the exercise of its First Amendment rights. Perhaps a hypothetical Plutocrat Party would enjoy a First Amendment right to exclude voters who cannot or will not pay, but the RPV has asserted no such interest. *Cf. Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (holding that Ohio law requiring disclosure of campaign contributions and disbursements violated the First Amendment as applied to a minor party whose adherents and suppliers might face harassment if identified).[7] Thus, this case involves no collision between section 5 and the First Amendment.

2. Moreover, the interpretation of section 5 advanced by appellants and the United States avoids any possibility of such a collision. To the extent that a given party activity is shielded from state regulation by the First

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[7] Both the RPV and the Attorney General seek to distinguish this case from *Smith* and *Terry* by pointing out that Virginia, unlike 1940s and 1950s Texas, has a two-party system. *See* Brief for Appellees at 36-37; Brief Amicus Curiae of the Commonwealth of Virginia at 16-17. That distinction is legally irrelevant. As *Classic* explained, the right to participate is uniformly protected whether the party primary "invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S. at 318. Moreover, it would be perverse to argue that in a state with two viable political parties, *both* parties would be free to exclude voters in violation of the Fourteenth, Fifteenth, or Twenty-Fourth Amendments.

Amendment, that activity by definition does not involve a state delegation of power. Put somewhat differently, if the First Amendment would bar a state from regulating a particular activity, then a political party's performance of that activity lies outside section 5.

Party platforms give a concrete illustration of this point. In *Brown v. Hartlage*, 456 U.S. 45 (1982), this Court held that the First Amendment essentially forbids states from regulating campaign promises. Since states cannot regulate these promises directly, parties are not acting under delegated state power when they make these promises, and thus they are not subject to preclearance. *See also* 28 C.F.R. § 51.7 (the drafting of party platforms does not require preclearance). So, too, after *Eu*, a party's decision to endorse candidates in its primary elections -- or to ban such endorsements -- would fall outside the scope of section 5, since the state's inability to regulate such activities directly means that the party's behavior does not involve a state-authorized public electoral function.

By contrast, as we have already pointed out, a state *can* pervasively regulate a party's nomination process, particularly to "prevent the derogation of the civil rights of party adherents." *Eu*, 489 U.S. at 232 (citing *Smith v. Allwright*). Thus, a party's decision to change the rules governing who can participate in its nomination process is subject to preclearance.

III. Applying Section 5 to Party Nominating Conventions Poses No Serious Logistical Difficulties

Contrary to the hyperbole in the RPV's brief, applying section 5 to nominating conventions would not eliminate

conventions as a practical method of nominating candidates. As our previous discussion suggests, the Party is simply wrong when it warns that "[i]f the filing fee is subject to preclearance than all substantive rules governing the convention must fall under the same requirement." Brief for Appellees at 20. Only those aspects of the convention that could have been subjected to state regulation in the first place fall within the scope of section 5.

Thus, a party's decisions about whether, when, and where to hold conventions and caucuses are subject to preclearance. But as the chronology of this case and the RPV's own rules show, the Party has more than enough time to obtain preclearance. The Call was issued almost six months before the Convention, J.A. 6, and it provided both the time and place for the meeting, J.A. 61. Similarly, the Party's Plan of Organization requires that notice for all local mass meetings, canvasses, and conventions be provided well in advance of the event, *see* J.A. at 51-52. Section 5 and the Justice Department's regulations require preclearance determinations to be made within 60 days, see 42 U.S.C. § 1973c; 28 C.F.R. § 51.9, and the Department also has provisions for expedited consideration when a submitting authority finds it necessary to implement a change without 60 days' lead time, *id.* § 51.34. The RPV has failed to identify *a single party rule* covered by section 5 whose adoption would have been foreclosed by the logistical requirements of the preclearance process. Such internal party decisions as the party's platform or the order in which speakers are to be recognized on the convention floor lie outside the scope of section 5 in the first place, and thus the fact that these decisions cannot be made ahead of time is irrelevant to the question whether section 5 covers changes in rules relating to who can seek certification as a delegate, when those rules themselves required certification more than 60 days before the convention, J.A. 62.

Requiring preclearance of the RPV's voting-related changes would pose no difficulty to the Department of Justice. The Attorney General reviews roughly 17,000 changes each year. *See Clark v. Roemer*, 500 U.S. 646, 658 (1991). Yet she interposes only a few hundred objections. *See, e.g., Dougherty County*, 439 U.S. at 41-42 (in 1977, less than 2% of submitted changes led to objections); Attorney General Ann. Rep. 125, 131 (1986) (in 1986, Attorney General objected to 101 of 20,000 changes). Thus, literally thousands of changes are submitted each year which are precleared without difficulty. The reason these changes must be submitted is not because they are discriminatory; the vast majority clearly are not. Rather, it is because they fall within the definition set by Congress: they involve voting standards, practices, and procedures.

Nothing in the thirty-year history of section 5 gives any support to the RPV's intimation that the Department will engage in partisan misbehavior. The claim that the Department will delay preclearance is essentially illusory: if the Department does not act within the statutory period, the party will be free to implement the change without preclearance. The claim that the Department can wrongfully prevent a party's use of nondiscriminatory rules is equally nonexistent: a party can obtain a declaratory judgment from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. The only roadblock section 5 throws in the path of a political party is one mandated by Congress: it forbids a political party in a covered jurisdiction from adopting new convention rules related to voting unless the party can show that those rules have neither a racially discriminatory purpose nor a racially discriminatory effect.

IV. Individuals Who Have Been Subjected to a Poll Tax or a "Substitute Therefor" May Bring Suit Under Section 10

As we explained in our opening brief, section 10 of the Voting Rights Act reflects Congress' determination to establish a mechanism for eradicating economic conditions on the franchise. Like many other sections of the Voting Rights Act, including its two most sweeping provisions -- sections 2 and 5 -- section 10 did not expressly provide that individuals who had been precluded from voting or who had faced a financial hardship in paying a poll tax could bring suit. Nonetheless, the same analysis this Court employed in *Allen* to imply a private right of action under section 5 requires a private right of action under section 10. *See* Brief of Appellants at 44-46. This understanding of section 10 was confirmed by amendments to the Voting Rights Act in 1975 that explicitly recognize the right of private individuals to sue to enforce the Act. *See id.* at 40-43.

Perhaps recognizing the weakness of the district court's rationale for dismissing appellants' section 10 claim, the RPV advances an alternative theory: a delegate filing fee is not a poll tax in the first place. Brief for Appellees at 45. Given the posture of this case, however, that claim involves a series of disputed facts. First, appellants alleged that the Republican Convention in fact operated as a de facto primary, since any voter who wished to attend and vote was permitted to do so. J.A. 6. If appellants' characterization is correct -- and at this stage in the litigation it must be taken as true -- then the RPV could no more condition the right to vote in its convention on payment of a $45 fee than it could condition the right to vote in a primary on such a payment. Second, if, as we have suggested above, the RPV is engaged in state action when it nominates its candidate, then the $45 is a "substitute" for a poll tax within the meaning of section

10(b); the RPV can no more impose such a charge itself than the Commonwealth could require such a payment.[8] Far from being a limited prohibition, as the RPV contends, section 10 is an explicit prohibition against any poll tax "or substitute therefor."[9]

The merits of appellants' section 10 claim are best left to the district court in the first instance, particularly since appellants' section 10 claim would be premature if this Court

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[8] That the RPV wants to finance its convention through the filing fee is legally irrelevant. *See Bullock v. Carter*, 405 U.S. 124, 147 (1972), (striking down a requirement that candidates in a party primary pay a filing fee to the party's county executive committee, despite the party's "rational" desire to raise funds). Moreover, by the Party's own account, the fee charged in this case seems to have significantly exceeded the amount necessary to finance the convention. *See* J.A. 24 (the 1993 convention cost roughly $373,000 and the filing fees for the 1994 convention amounted to roughly $511,000 – 14,614 certified delegates at $35 to the state party each). Finally, the absence of any alternative to paying a fee to participate has consistently been viewed by this Court as a fatal defect. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 718 (1974).

[9] As we recount more fully in our opening brief, section 10 was enacted after the ratification of the Twenty-Fourth Amendment, which prohibits poll taxes in federal elections, and before *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), which declared poll taxes in state elections to be unconstitutional. Brief of Appellants at 40. Consequently, in section 10(a), Congress only declared poll taxes unconstitutional "in some areas." The qualification "in some areas" was necessary because *Harper* had not yet been decided when the Voting Rights Act was first enacted. Another provision in the original act, section 10(d), contemplated the possibility that some poll taxes might be valid. Pub. L. 89-110, title I, § 10(d), 79 Stat. 442 (1965). Subsection (d) allowed for the late payment of poll taxes if a poll tax were held to be constitutional, but it was repealed by the 1975 amendments to the Act. Pub. L. 94-73, § 408(1), 89 Stat. 405 (1975). The qualification "in some areas" in subsection (a) was not repealed in 1975, but it did not need to be. After the decision in *Harper*, the enforcement authority conferred by section 10(b) extended to all poll taxes "or substitute[s] therefor."

were to reverse the district court's judgment on our section 5 claim: the RPV would be prohibited from imposing any fee greater than the fee charged in 1964 unless and until it received preclearance.

V. This Case Is Not Moot

The RPV asserts that this case is moot because the convention has now occurred, and there is no further controversy. Brief for Appellees at 46. Since the Party and its local affiliates collected considerably more than $500,000 in such fees, including $45 from appellant Morse, it is not entirely surprising that they now proclaim that the game is over and everyone should go home. But this case cannot be moot as long as the Party retains the fee it collected illegally from appellant Morse. The complaint explicitly sought an order requiring the Party to refund the fee, *see* J.A. 12, and the retention of that fee remains in controversy.[10]

Moreover, with regard to appellants' request for declaratory and injunctive relief, this case falls squarely within this Court's long-standing doctrine that cases challenging electoral practices and procedures are not rendered moot by the occurrence of an individual election or nomination, because they are "capable of repetition, yet evading review," *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1968) (internal quotations omitted). *See also, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983); *Storer v. Brown*, 415 U.S. at 737 n. 8; *Rosario v.*

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[10] Appellees wrongly suggest that affirmance is the proper course should the Court find this action moot. Under such circumstances, the judgment of the court below should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See, e.g., Harris v. City of Birmingham*, 112 S.Ct. 2986 (1992).

Rockefeller, 410 U.S. 752, 756 n. 5 (1973). The Party's sworn assertions that it has consistently imposed *some* fee at its conventions and has repeatedly raised the fee, *see* J.A. 24, and its claim two pages earlier in its brief that charging such a fee reflects a "vital" party interest in avoiding reliance on large contributors to finance its convention, Brief for Appellees at 45, clearly establish the potential for repetition.[11]

CONCLUSION

For the foregoing reasons and those stated in our opening brief the judgment of the district court should be reversed.

Respectfully submitted,

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[11] The RPV's suggestion that this case could somehow have been fully litigated in the six months between the call for the convention and the convention itself is meritless. Already more than a year has elapsed since appellants filed their complaint.

(8)

No. 94-203

In the Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, ET AL., APPELLANTS

v.

OLIVER NORTH FOR UNITED STATES SENATE COMMITTEE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. Whether the decision of a political party to require voters to pay a fee to participate in the party's convention for nominating a candidate for the United States Senate is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973c.

2. Whether voters may bring a private action under the anti-poll-tax provision of the Act, 42 U.S.C. 1973h.

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INTEREST OF THE UNITED STATES

This case involves the extent to which Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, covers the activities of political parties. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted for administrative preclearance; she is also responsible for defending declaratory judgment actions brought in the United States District Court for the District of Columbia seeking judicial preclearance. The Act also gives the Attorney General authority to bring actions to prevent unprecleared changes from taking effect. The Court's resolution of this case will therefore affect the Attorney General's enforcement responsibilities under Section 5.

On January 4, 1995, in response to this Court's invitation, the Solicitor General submitted a brief expressing the views of the United States. The brief supported appellants' position and recommended that the Court note probable jurisdiction.

STATEMENT

This case involves the decision of the Republican Party of Virginia (the Party) to elect its 1994 nominee for the United States Senate at a convention open only to voters who paid a $35 or $45 fee. Appellants are three individuals registered to vote in Virginia. They contend that the Party's decision to require the fee violated the Voting Rights Act of 1965 (the Act), 42 U.S.C. 1973 *et seq.*, in two ways: (1) the Party did not obtain preclearance for the fee, as required by Section 5 of the Act, 42 U.S.C. 1973c; and (2) the fee violates the anti-poll-tax provision in Section 10 of the Act, 42 U.S.C. 1973h. A three-judge court dismissed appellants' claims under Section 5 and Section 10 for failure to state a claim for which relief could be granted.[1]

1. Virginia law authorizes a political party to place its nominee for the United States Senate on the general election ballot if the party received at least 10% of the vote in any race in either of the two preceding statewide elections. Virginia law also authorizes a party to select its senatorial nominee by a primary election or other means. Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993).

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[1] In this posture, the allegations in appellants' complaint must be taken as true, *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977), and the dismissal of their claims under Section 5 and Section 10 of the Act cannot be upheld "unless it appears beyond doubt that the [appellants] can prove no set of facts in support of [those] claim[s] which would entitle [them] to relief," *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See also, *e.g.*, *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) (reviewing dismissal of equal protection claim on appeal).

The Party has used a variety of means to select its senatorial nominees. See David S. Johnson Aff. (Johnson Aff.) ¶ 3, attached as an addendum to The Republican Party of Virginia's Mem. of Law Opposing Pls.' Mot. for a Prelim. Injunction. In 1964, for example, the Party's senatorial nominee was selected by its State Central Committee, after a convention called for that purpose refused to nominate a candidate to oppose Senator Harry Byrd. In most later election years, however, the Party chose its senatorial nominee at a convention. See Mot. to Affirm or Dismiss 3 n.1; Johnson Aff. ¶¶ 13, 15. In 1990, which was the senatorial election year immediately preceding the one at issue in this case, the Party decided to select its nominee at a primary election, but the election was cancelled because no one challenged the Party's incumbent. See Johnson Aff. ¶ 14. The Party has never sought judicial or administrative preclearance of those changes in its nominating process under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Compl. ¶ 47.

For the 1994 senatorial election, the Party decided to select its nominee at a convention to be held on June 3, 1994. Compl. ¶ 12; see Johnson Aff. ¶ 16. According to the Party's Plan of Organization, delegates to such a convention are to be selected at local "mass meetings," which are open to anyone registered to vote in Virginia who supports the Party's principles and is willing to declare his or her support for the Party's nominee. Johnson Aff. ¶¶ 4-5. Although the Plan provides for the convention delegates to be "elect[ed]" at these mass meetings, *id.* at ¶ 5, in practice any qualified voter who wants to be a delegate and shows up at a mass meeting is chosen as a delegate. Compl. ¶ 14; see Mot. to Affirm or Dismiss 2.

A person cannot, however, attend the Party's convention merely because he or she has been selected as a delegate. Instead, the delegate must also pay a non-refundable fee to the Party. The amount of the fee has increased over

the years. For the 1994 convention, the fee was $35 or $45, depending on the locality from which the delegate was selected. Compl. ¶ 16; see Johnson Aff. ¶ 11. Appellants allege that the Party's practice of charging the fee was not in effect on November 1, 1964 (the effective date for Virginia's coverage under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c). Compl. ¶ 11. Nonetheless, the Party has never sought preclearance of the fee under Section 5 of the Act. Compl. ¶¶ 46-47.

2. Appellants are registered voters in Virginia who wanted to attend the Party's 1994 convention. Appellants Kenneth Bartholomew and Kimberly Enderson were deterred from attending by the fee requirement. Appellant Fortis Morse learned of the fee requirement when he went to the headquarters of the Albemarle County Republican Party in February, 1994, to register as a delegate. Because Morse did not have enough money in his bank account to pay the $45 fee, he asked a party official whether it could be waived. The official said no. Morse borrowed the money from a friend and was permitted to register as a delegate only after paying the fee. Compl. ¶¶ 4-6, 17-25, 35-39.

While at the Party's county headquarters, Morse met an official of the Oliver North for United States Senate Committee (North Committee). The North Committee official gave Morse $45 to repay his friend when Morse indicated that he would support North at the Convention. Morse repaid the North Committee. The Party has retained Morse's $45. Compl. ¶¶ 26-33.

3. On May 2, 1994, appellants filed their five-count complaint in this action in the United States District Court for the Western District of Virginia. Counts 1 and 2 charged that the fee violates the Twenty-Fourth and Fourteenth Amendments to the Constitution. Compl. ¶¶ 41-44. Counts 3 and 4 alleged that the fee violates Section 5 of the Act, 42 U.S.C. 1973c, because it was not precleared, and Section 10 of the Act, 42 U.S.C. 1973h,

because it is a poll tax. Compl. ¶¶ 45-49. Count 5 charged that the North Committee violated the anti-vote-buying provision of the Act, Section 11(c) (42 U.S.C. 1973i(c)). Compl. ¶¶ 50-51. The complaint sought, among other relief, preliminary and permanent injunctions preventing the Party from imposing the fee and ordering it to return Morse's $45. Compl. ¶¶ 6-7, 9.

A three-judge court was convened to consider appellants' claims under Section 5 and Section 10 of the Act. See 42 U.S.C. 1973c, 1973h(c); 28 U.S.C. 2284(a). After expedited briefing and a hearing, the court granted appellees' motion to dismiss those claims. J.S. App. A2-A14.[2]

With regard to appellants' Section 5 claim, the court recognized that political parties are subject to Section 5 "to the extent they are empowered by the State to conduct primary elections for purposes of selecting national convention delegates." J.S. App. A8. But the court held that Section 5 never applies to "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting." *Id.* at A8-A9. The court believed that this holding was supported by the regulation of the Attorney General that cites changes in party rules for primary elections as one example of a type of change that is covered by Section 5. J.S. App. A9-A10 (discussing 28 C.F.R. 51.7). The court also relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). In

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[2] The three-judge court remanded appellants' Section 11(c) claim and their constitutional claims to a single-judge district court. Appellants voluntarily dismissed the Section 11(c) claim and asked the single-judge court to postpone consideration of the constitutional claims. J.S. 6 n.6. The only claims before this Court are the claims in Counts 3 and 4, alleging violations of Section 5 and Section 10 of the Act.

Williams, the district court held that Section 5 did not cover a party's decision to change its method of selecting delegates to a national convention from a system under which they were appointed to a system under which they were chosen in open convention. See J.S. App. A10. The court in this case concluded that, because the fee at issue here was imposed in connection with a convention, rather than a primary, the Section 5 challenge to the fee had to be dismissed. J.S. App. A10-A11.

In dismissing appellants' Section 10 claim, the court held that actions under Section 10, the anti-poll-tax provision of the Act, may be brought only by the Attorney General, and not by a voter subject to a poll tax. J.S. App. A11-A12. The court based that holding on the fact that Section 10 of the Voting Rights Act does not expressly authorize private actions. *Id.* at A12. The court recognized that in *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969), this Court held that Section 5 of the Act is enforceable by private actions, even though it, like Section 10, does not expressly authorize them. J.S. App. A12. The court observed, however, that Section 10 differs from Section 5, because Section 10 expressly authorizes enforcement actions by the Attorney General. J.S. App. A12.

SUMMARY OF ARGUMENT

1. A. Section 5 applies to "all entities having power over any aspect of the electoral process within designated jurisdictions." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 118 (1978). The Attorney General has accordingly interpreted Section 5 to cover political parties when they perform a state-delegated "public electoral function" in a manner that affects "voting" within the meaning of the Act. 28 C.F.R. 51.7. The lower courts have endorsed the Attorney General's interpretation.

B. The Party's decision to impose a fee on delegates to its 1994 convention fits the criteria for Section 5 cover-

age adopted by the Attorney General and endorsed by the lower courts. In holding a convention to nominate a senatorial candidate, the Party was carrying out a state-delegated public electoral function, because, by operation of Virginia law, the nominee chosen at the convention gained automatic access to the general election ballot. The Party's decision to impose the fee also affected voting in the general election by excluding people who could not pay the fee from the process of selecting the nominee whose name would appear on the general election ballot. This Court has held that similar changes affect voting. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 174-181 (1985).

C. The district court erred in holding that Section 5 applies when a political party holds a primary election, but not when it holds a convention, to select a nominee whose name will appear on the general election ballot. Whether the party uses the primary-election method or the convention method of nomination, it performs a state-delegated public electoral function. See *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953). Moreover, changes in the rules for participating in nominating a candidate at a convention, like changes in the rules for participating in a primary election, may affect voting in the general election. In holding that party conventions nevertheless fall outside Section 5, the district court violated the principle that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *Hampton County Election Comm'n*, 470 U.S. at 178. Nor was the district court's holding required by this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6, 1972), summarily aff'd, 409 U.S. 809 (1972). The district court in *Williams* recognized that rights associated with the selection of delegates to a nominating convention "are the type of rights Congress intended to safeguard" in Section 5. *Williams*, slip op. 4.

D. Section 5, as construed in the Attorney General's regulation, applies to party convention rules in a "workable" manner. Cf. *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 505 (1992). Under that regulation, changes in convention rules must be precleared when they relate to the nomination of a candidate whose name will appear on the general election ballot. Many other convention rules are not subject to preclearance under the regulation. For example, preclearance is not required for rules regarding the drafting of the party platform, and generally is not required for rules regarding administration of the party, unless they involve the exercise of a state-delegated public electoral function or elections for party office.

E. The application of Section 5 to party convention rules does not unconstitutionally interfere with a party's freedom of association. This Court made clear in *Allwright* and *Terry* that, when a party performs a public electoral function, its freedom of association interests do not prevail over the requirements of the Fifteenth Amendment. Nor do they negate the protection afforded by Section 5, which was enacted to enforce the Fifteenth Amendment.

2. The district court's holding that private parties may not invoke the remedies against unlawful poll taxes in Section 10 of the Act conflicts with this Court's decision in *Allen*. *Allen* held that voters may bring private actions under Section 5, even though the Act does not expressly authorize such actions. The reasoning of *Allen* applies here.

ARGUMENT

I. THE DECISION OF THE REPUBLICAN PARTY OF VIRGINIA TO IMPOSE A FEE ON DELEGATES TO ITS CONVENTION FOR SELECTING A SENATORIAL NOMINEE IS A CHANGE "WITH RESPECT TO VOTING" UNDER SECTION 5 OF THE VOTING RIGHTS ACT

A. Section 5 Applies To A Political Party When The Party Exercises A State-Delegated Public Electoral Function In A Way That Affects "Voting" Within The Meaning Of The Act

Section 5 of the Voting Rights Act prohibits certain jurisdictions, including Virginia, from changing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" until the change has been precleared by either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c.[3] The preclearance requirement applies only to changes that have a "direct relation to, or impact on, voting." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 506 (1992). The term "voting" is defined broadly under the Act, 42 U.S.C 1973*l*(c)(1):

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appro-

[3] To obtain preclearance, a covered jurisdiction must demonstrate "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." 42 U.S.C. 1973c.

> priate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Moreover, Section 5 is "expansive within its sphere of operation." *Presley*, 502 U.S. at 501. "[A]ll changes in voting must be precleared" (*ibid.*), even if they are "minor," and without regard to whether they have a racially discriminatory purpose or effect. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566, 570 (1969).

This Court has made clear that a voting change can be covered by Section 5 even if the change is not made by a governmental unit. The Court stated in *United States* v. *Board of Comm'rs*, 435 U.S. 110 (1978), that Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." *Id.* at 118.[4] In that respect, the Court explained, Section 5 is "like the constitutional provisions it is designed to implement," the Fourteenth and Fifteenth Amendments. *Ibid.* Those Amendments govern political party activities that are "part of the machinery for choosing [government] officials." *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944); see also *Terry* v. *Adams*, 345 U.S. 461 (1953). The Court in *Board of Comm'rs* accordingly relied on cases

[4] Based on that statement, the Court in *Board of Comm'rs* held that Section 5 required preclearance of the decision of Sheffield, Alabama, to change from a commission form of government to a mayor-council form of government. 435 U.S. at 117-135. In so holding, the Court rejected Sheffield's argument that it was not covered by Section 5 because it was not a "political subdivision" as defined in the Act, since it had no power to register voters. 435 U.S. at 126-129. The Court subsequently relied on the statement in *Board of Comm'rs* quoted in the text, *supra*, to hold in *Dougherty County* v. *White*, 439 U.S. 32, 44 (1978), that Section 5 applied to a rule adopted by a county board of education requiring employees to take unpaid leaves of absence while running for elective public office.

interpreting the scope of the Fourteenth and Fifteenth Amendments to interpret the scope of Section 5. 435 U.S. at 127 (citing *Terry*).

In accordance with this Court's decisions, the Attorney General has interpreted Section 5 to apply to "[c]ertain activities of political parties." 28 C.F.R. 51.7. A regulation of the Attorney General adopted in 1981 states (*ibid.*):

> A change affecting voting effected by a political party is subject to the preclearance requirement [of Section 5]: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction * * *.

The regulation further states that, "[f]or example," Section 5 applies to "[c]hanges with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen." *Ibid.*[5]

The lower federal courts have endorsed the criteria in the Attorney General's regulation. For example, the district court in *Hawthorne* v. *Baker*, 750 F. Supp. 1090 (M.D. Ala. 1990), vacated as moot, 499 U.S. 933 (1991), held that Section 5 applied to changes in the method for selecting members of the Alabama State Democratic Executive Committee and members of certain County Democratic Executive Committees. 750 F. Supp. at 1094-1097. The court relied on its prior decision holding that "political parties in this state, to the extent they are empowered by the state to conduct primary elections and to have their national convention delegates selected, are subject to § 5." *Id.* at 1094 (citing *MacGuire* v.

[5] The regulation also provides examples of party activities that "are not subject to the preclearance requirement" of Section 5, including "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms." 28 C.F.R. 51.7.

Amos, 343 F. Supp. 119 (M.D. Ala. 1972) (three-judge court) (per curiam)). The court found further support for its holding in the Attorney General's regulation, which the court noted was "entitled to particular deference." 750 F. Supp. at 1094-1095 (quoting *Dougherty County* v. *White*, 439 U.S. 32, 39 (1978)).[6]

There is evidence that Congress also endorsed the Attorney General's criteria for Section 5 coverage of political parties. Even before adopting the current regulation in 1981 (quoted *supra*), the Attorney General precleared numerous proposed changes in party rules and on some occasions objected to such changes.[7] Evidence of the Attorney General's practice of preclearing some political party rules under Section 5 was before Congress when it reenacted the Voting Rights Act in June, 1982. See *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Com.*, 97th Cong., 1st Sess. Pt. 3, at 2246, 2265 (1981) (appendix to letter from James P. Turner, Acting Assistant Attorney General, to Rep. Edwards, listing objections, including ones filed against political parties). Although Congress amended other provisions of the Act in 1982, it did not amend Section 5 to exclude coverage of political parties. Moreover, Con-

[6] See also *Fortune* v. *Kings County Democratic Comm.*, 598 F. Supp. 761, 763, 765 (E.D.N.Y. 1984) (relying on Attorney General's regulation to hold that Section 5 applied to change affecting the voting membership of party's executive committee, where the committee performed "public electoral function[s]"); cf. *Wilson* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 1299, 1302-1303 (M.D.N.C. 1970) (three-judge court) (Section 5 applied to "Rotation Agreement" that limited county from which party's state senatorial candidate could be selected).

[7] Of particular relevance, on April 12, 1982, the Attorney General precleared the delegate apportionment rules adopted by the Democratic Party of Virginia for its senatorial nominating convention to be held later that year.

gress rejected a number of proposals to restrict the scope of Section 5 in other ways. See *Hampton County Election Comm'n*, 470 U.S. at 176 & n.21. Under those circumstances, Congress's failure to restrict the scope of Section 5 in 1982 supports the Attorney General's interpretation of that provision as covering certain political party activities. Cf., *e.g.*, *Board of Comm'rs*, 435 U.S. at 133 (according "special significance" to testimony of Assistant Attorney General in congressional hearing explaining scope of Section 5).

B. Section 5 Applies To The Party's Decision To Charge A Fee To Convention Delegates, Because That Decision Involves The Exercise Of A State-Delegated Public Electoral Function And Affects "Voting" Within The Meaning Of The Act

Under the criteria adopted by the Attorney General and approved by the lower courts, Section 5 covers the decision of the Republican Party of Virginia to charge a fee to those who wished to participate in the process of nominating the Party's candidate for the 1994 election for the United States Senate. The Party's nomination process was, by operation of state law, "part of the machinery for choosing [government] officials." *Smith* v. *Allwright*, 321 U.S. at 664. In addition, the decision to charge the fee affected voting in the general election.

1. Virginia law entitles the Party automatically to place its senatorial nominee on the general election ballot. See Va. Code Ann. § 24.2-511 (Michie 1993). It also authorizes the Party to choose the method it will use to select the candidate who gains this automatic access to the ballot. See *id.* §§ 24.2-508, 24.2-509(A). In deciding to select its senatorial nominee at a convention, the Party thus was "acting under authority explicitly * * * granted by" Virginia. 28 C.F.R. 51.7(b). The nomination process, moreover, was a "public electoral function," since

the nominee gained automatic access to a ballot for public office by operation of state law. 28 C.F.R. 51.7(a).[8]

This Court's decisions concerning the Fifteenth Amendment support the conclusion that, in charging a fee to convention delegates, the Party was exercising a state-delegated public electoral function. In *Smith* v. *Allwright, supra,* the Court held that a party rule excluding black people from voting in the party's primary was subject to the Fifteenth Amendment. 321 U.S. at 657-666. The Court relied on state laws regulating the conduct of primary elections and limiting the names that could appear on the general election ballot to the nominees selected by the primaries. *Id.* at 663. The Court reasoned that by virtue of those laws, the State "endorses, adopts, and enforces the discrimination" of the party in the primary. *Id.* at 664.

In *Terry* v. *Adams, supra,* the Court held that the "pre-primary" election held by the Jaybird Democratic Association, from which blacks were excluded, was subject to the Fifteenth Amendment. The Court determined that state law and the conduct of state officials caused the pre-primary effectively to supplant the later official primary conducted by the Democratic Party. See 345 U.S. at 469 (opinion of Black, J.); *id.* at 477 (opinion of Frankfurter, J.); *id.* at 482 (opinion of Clark, J.). The connection between the Jaybird pre-primary nomination process and the general election, however, was not as close as in the present case. Victors in the Jaybird pre-primary were not legally compelled to run in the later, official Democratic primary, see *Terry*, 345 U.S. at 463

[8] Not every political association is entitled to such preferential ballot access under Virginia law. While groups of people are free to join together, call themselves "political parties," hold conventions, and "nominate" candidates for office, the candidates they select are not entitled to automatic ballot access unless the group's nominee received at least 10% of the vote in any statewide election in the previous two election cycles. Va. Code Ann. § 24.2-101 (Michie 1993).

(opinion of Black, J.), and losers in the Jaybird pre-primary were not legally barred from running in the later primary. See *id.* at 483 n.13 (opinion of Clark, J.). Here, by contrast, the nominating convention by law controls a position on the general election ballot.

2. The Party's decision to impose the fee "affect[s] voting" (28 C.F.R. 51.7) in the general election. It does so by affecting the selection of candidates who gain automatic access to the general election ballot.

This Court has consistently held that changes in the procedures by which candidates gain positions on the general election ballot affect voting in the general election and are therefore covered by Section 5. In *Allen,* for example, the Court held that Section 5 applies to changes that make it more difficult for independent candidates to petition for a place on the general election ballot. See 393 U.S. at 551, 570. The Court reasoned that such changes affect voting because they "might * * * undermine the effectiveness of voters who wish to elect independent candidates." *Id.* at 570.[9] See also *Hampton County Election Comm'n,* 470 U.S. at 174-181 (Section 5 applied to change in length of time between candidate filing period and election); *Dougherty County,* 439 U.S. at 37-43 & n.10 (school board rule requiring candidates for office to take unpaid leave affected voting because it "tends to deny some voters the opportunity to vote for a candidate of their choosing") (internal quotation marks

[9] Justice Harlan agreed in *Allen* that these changes affected voting, and were therefore covered by Section 5, even though he took a different view of the scope of Section 5 than did the majority. He reasoned that, "[s]ince the Voting Rights Act explicitly covers 'primary' elections, see § 14(c)(1) [42 U.S.C. 1973*l*(c)(1)]," and since the petition procedure for independent candidates was "the functional equivalent of the political primary," there was "no good reason why it should not be included within the ambit of the Act." *Allen,* 393 U.S. at 592 (Harlan, J., concurring in part and dissenting in part). Here, the party convention is the "functional equivalent of the political primary."

omitted); *Fortune*, 598 F. Supp. at 765 (change in voting membership of party executive committee affected voting because the committee controlled access to the general election ballot in certain circumstances).

The Court has also recognized in an analogous context that changes in a party's nomination procedures may affect voting in the general election. In *United States* v. *Classic*, 313 U.S. 299 (1941), the Court held that Congress may, in exercising its constitutional power to regulate general congressional elections (U.S. Const. Art. I, § 4), also regulate congressional primary elections. 313 U.S. at 317-321. The Court reasoned that the selection of a party's nominee for public office at a primary may "affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary"; specifically, the exclusion of a candidate from the primary may "operate to deprive the voter of his constitutional right of choice" at the general election. *Id.* at 319; see also *id.* at 318 (Art. I, § 2 applies to primaries where they are "an integral part of the procedure of choice [of representatives to Congress], or where in fact the primary effectively controls the choice.").

The same reasoning applies when a party chooses its nominee by convention, rather than primary election. Justice Pitney (joined by Justices Brandeis and Clarke) made this clear in his concurrence in *Newberry* v. *United States*, 256 U.S. 232 (1921). In a discussion endorsed by the Court in *Classic*, 313 U.S. at 319, Justice Pitney concluded in *Newberry* that Congress has the power to regulate "primary elections and nominating conventions" that choose congressional candidates. 256 U.S. at 286 (Pitney, J., concurring). He considered this power to be necessarily implied in Congress's authority to regulate general elections because, "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Ibid.*

C. The District Court Erred In Holding That Section 5 Never Applies To Party Conventions

1. The district court erred in holding that Section 5 never applies to "a change in political party rules dealing not with primary elections, but instead with a party convention, canvass, or mass meeting." J.S. App. A8. In construing the scope of the Fifteenth Amendment, this Court has declined to allow "a variation of result" to follow "from so slight a change in form." *Smith* v. *Allwright*, 321 U.S. 649, 661 (1944). Similarly, the Court has held that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *Hampton County Election Comm'n*, 470 U.S. at 178; see also *Riddell* v. *National Democratic Party*, 508 F.2d 770, 774 (5th Cir. 1975); cf. *Newberry*, 256 U.S. at 286-287 (Pitney, J., concurring).

The district court ignored those principles. Whether a party selects a nominee at a primary or at a convention, it is exercising a state-delegated public electoral function if the nominee gains automatic access to the general election ballot. In either case, moreover, changes in the nomination process may affect voting in the general election by affecting the choices available to voters in that election. Under the district court's decision, however, Section 5 would not apply to a change in party rules, even if the change had a significant, discriminatory effect on voting in the general election, as long as the change related to the convention process.

The district court's decision thus permits a political party to avoid Section 5's preclearance requirement simply by selecting its nominees in a convention rather than a primary election. The initial change from a primary to a convention process would have to be precleared. See *Presley*, 502 U.S. at 501-503. But once the process is in place, the district court's decision would allow the party to adopt any kind of exclusion, no matter how invidious,

without having to preclear it. A party could, for example, even adopt a rule excluding black voters from serving as voting delegates to its convention. "The only recourse for the minority group members affected by such changes would be the one Congress implicitly found to be unsatisfactory: repeated litigation." *Board of Comm'rs*, 435 U.S. at 125. The district court's decision leads to consequences that Section 5 was designed to prevent.

2. In holding that Section 5 does not apply to party conventions, the district court relied on this Court's summary affirmance of *Williams* v. *Democratic Party*, No. 16286 (N.D. Ga. Apr. 6 1972), summarily aff'd, 409 U.S. 809 (1972). See J.S. App. A10. *Williams*, however, does not support the district court's decision.

In *Williams*, the district court held that Section 5 did not apply to a party's decision to change its method of selecting delegates to the party's national convention from an appointment system to a system under which delegates were chosen in open convention. The court stated that it was "convinced that voting rights connected with the delegate election process are the type of rights Congress intended to safeguard," and it quoted portions of the Act's legislative history stating that the election of delegates to party conventions would be covered by Section 5. See *Williams*, slip op. 4. The court reasoned, however, that, because the Act does not expressly authorize political parties to obtain preclearance, it provided "no way for the State Party to gain the required federal approval." Slip op. 5. Based on that understanding of the Act, the court concluded that Congress must not have intended the Voting Rights Act to apply to the changes adopted by the party. *Ibid.*

Although *Williams* concerned rules for a party convention, its reasoning would extend to rules for a party primary. In either context, such rules would fall outside Section 5 because the party could not "gain the required federal approval" of them. *Williams*, slip op. 5. Thus, the

reasoning of *Williams* conflicts with the recognition of the district court in this case that Section 5 *does* cover some changes in a party's rules for primary elections. See J.S. App. A8. More importantly, the reasoning of *Williams* cannot be reconciled with decisions of this Court after *Williams* holding that Section 5 "applies to all entities having power over any aspect of the electoral process within [covered] jurisdictions." *Board of Comm'rs*, 435 U.S. at 118; *Dougherty County*, 439 U.S. at 44.

Williams rested on a premise—that political parties cannot obtain preclearance of party rule changes—that is no longer true, if it ever was. Although the regulations implementing Section 5 did not explicitly so provide when *Williams* was decided, they now provide that "[a] change effected by a political party * * * may be submitted by an appropriate official of the political party." 28 C.F.R. 51.23(b). Because the lower court's decision in *Williams* is inconsistent with later decisions of this Court and rests upon a factual premise that no longer obtains, this Court's summary affirmance in *Williams* does not control the present case.

D. Section 5 Applies To Party Conventions In A Workable Manner

This Court has said that Section 5 should be construed to provide a "workable standard to determine when preclearance is required" under Section 5. *Presley*, 502 U.S. at 505. The Attorney General's regulation provides a workable standard for determining when changes in the rules for a party convention must be precleared under Section 5.[10]

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[10] Indeed, the very existence of the regulation distinguishes this case from *Presley*. The Attorney General had expressly refused to issue a regulation governing the type of change at issue in *Presley*—reallocation of authority among government officials—because he did "not believe that a sufficiently clear principle ha[d]

1. Political party conventions generally have three principal purposes: to nominate candidates to appear on the general election ballot; to draft the party platform; and to amend or adopt rules governing the administration of the party. Under the Attorney General's regulation, Section 5 applies to nomination-related activities; Section 5 does not, however, apply to any platform-drafting activities or to most administrative activities. That is because, for the most part, it is only in carrying out nomination-related activities that a party exercises a state-delegated public electoral function in a manner that may affect voting in the general election.[11]

Thus, party decisions about who may select the nominee are subject to Section 5 under the Attorney General's regulation. Cf. *Henderson* v. *Graddick*, 641 F. Supp. 1192, 1195, 1201 (M.D. Ala. 1986) (three-judge court) (per curiam) (Section 5 covers change from open to closed primary). So are decisions about the rules for nomination—regarding, for example, whether a majority, supermajority, or plurality vote is required for nomination—and about the rules governing the apportionment of voting power among delegates. Cf. *Port Arthur* v. *United States*, 459 U.S. 159, 165-168 (1982) (Section 5 covers majority-vote requirement for at-large city council seats); *Georgia* v. *United States*, 411 U.S. 526, 531-535 (1973) (Section 5 covers reapportionment). Such decisions affect the way in which party adherents select the party's nominee, and they therefore also affect the

yet emerged distinguishing covered from noncovered reallocations." 52 Fed. Reg. 486, 488 (1987) (notice of final rule). By contrast, the Attorney General delineated a sufficiently clear principle to distinguish covered from noncovered political party activities in 28 C.F.R. 51.7, and has applied the regulation to such activities for more than decade. Appellees do not claim that the application of that regulation has interfered unduly with political parties.

[11] Because local mass meetings are simply an earlier step in the party's exercise of its nominating function, the discussion in the text applies to rules governing them as well.

choices voters have at the general election. Moreover, those decisions have the potential to discriminate against minorities in the party and in the general electorate. See *Dougherty County*, 439 U.S. at 42.[12]

Many activities at a political party convention, however, are not subject to Section 5 under the Attorney General's regulation. Changes in the rules for drafting a party platform, for example, are not covered. See 28 C.F.R. 51.7. Although such changes might conceivably affect selection of the party's nominee—for example, by influencing the platform's substance and thereby inducing delegates to choose a candidate who agrees with its substance—that effect would not trigger Section 5 coverage for two reasons. First, the effect of a change in platform-drafting rules on voting in the general election would be remote and speculative; it would not have a "direct relation to, or impact on, voting." *Presley*, 502 U.S. at 506. Second, such a change reflects an exercise of the party's power to determine the political positions it will advocate, a power that the party possesses independently of its state-delegated authority to place a candidate on the general election ballot. For similar reasons, rules for convention debates are ordinarily not covered by Section 5 under the Attorney General's regulation.

Finally, most changes in the rules for the party's internal administration need not be precleared under the Attorney General's regulation. Those rules usually reflect the party's inherent power, like that of other associations, to regulate its day-to-day-operations. As such, they ordi-

[12] For similar reasons, when one of the purposes of a convention is to nominate a candidate whose name will appear on the general election ballot, the party's choice of where and when to hold its convention is covered by Section 5. Cf. *Perkins* v. *Matthews*, 400 U.S. 379, 387-388 (1971) (location of polling places is covered). Such choices might well have a discriminatory purpose if, for example, convention sites are selected "at distances remote from black communities or at places calculated to intimidate blacks from entering." *Id.* at 388.

narily fall outside Section 5, unless they relate to the performance of a state-delegated public electoral function or elections for party office. See pp. 9-13, *supra*; see also 42 U.S.C. 1973*l*(c)(1) ("voting" defined to include voting in elections for "party office"). In particular, preclearance generally would not be required for changes with respect to "the recruitment of party members" or "the conduct of political campaigns." 28 C.F.R. 51.7

2. Appellees contend that Section 5 cannot be applied to conventions in a workable manner because it is difficult for the Party to obtain preclearance of its convention rules. See Mot. to Affirm or Dismiss 5-8; Appellees' Suppl. Br. 4-9. They point out that, under the Party's current procedures, rules for a nominating conventions are not finally adopted until the convention itself takes place. That fact, however, does not justify construing Section 5 to exclude all changes in convention rules.

Nothing requires the Party to adopt its procedures at the convention; it could adopt those convention rules subject to Section 5 sufficiently in advance of the convention to permit preclearance. Indeed, the Party's decision to charge the fee at issue here was announced six months before the convention. See Johnson Aff. ¶ 16 & Exh. B. The Party could also adopt other nomination-related rules ahead of time. Thus, the Party's purported difficulties in complying with the preclearance requirement "are largely of [its] own making." *Hampton County Election Comm'n*, 470 U.S. at 180; see also *id.* at 179-180 (covered jurisdiction cannot avoid preclearance requirement by enacting voting changes meant to take effect before Attorney General completes administrative review).[13]

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[13] In addition, Section 5 provides for expedited review by the Attorney General "upon good cause shown." 42 U.S.C. 1973c; see 28 C.F.R. 51.34.

E. Section 5 Does Not Unconstitutionally Interfere With A Party's Freedom Of Association

The Party claims that application of Section 5 to changes in its convention rules would violate its freedom of association. Mot. to Affirm or Dismiss 10, citing, *inter alia*, *Democratic Party of United States* v. *Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). As discussed above, however, Section 5 applies only to political party activities that involve the exercise of a state-delegated public electoral function. The application of Section 5 to such activities does not unconstitutionally interfere with a party's freedom of association.

In *Smith* v. *Allwright*, *supra*, this Court rejected a claim strikingly similar to that asserted by the Party in this case. In *Allwright*, black voters argued that a rule of the Texas Democratic Party barring them from voting in the party's primary election violated the Fourteenth and Fifteenth Amendments. The party "defended [the rule] on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary." 321 U.S. at 657.

This Court rejected that defense. It held that, because the party's primary election was "a part of the machinery for choosing officials," *Allwright*, 321 U.S. at 664, the party's rule excluding blacks from voting in the primary was subject to the Fifteenth Amendment. The Court reasoned that "[t]he privilege of membership in a party may be * * * no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State." *Id.* at 664-665. In *Terry* v. *Adams*, *supra*, the

Court relied on *Allwright* to declare unconstitutional an unofficial "pre-primary" election held by the Jaybird Democratic Association of Texas from which black voters were excluded. See 345 U.S. at 470; *id.* at 481-484 (Clark, J., concurring).

Allwright and *Terry* demonstrate that when a political party performs a public electoral function, its freedom of association interests do not prevail over the requirements of the Fifteenth Amendment. Because "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in" that Amendment, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966), this rule extends to statutes, such as the Voting Rights Act, passed under Congress's "remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Ibid.*

Indeed, this Court has never found a violation of a political party's associational rights in the enforcement of a statute designed to prevent racial discrimination in voting. Decisions of this Court finding such a violation have expressly noted that the challenged government action was not taken to prevent racial discrimination. See, *e.g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 232 (1989) (citing *Smith* v. *Allwright*, *supra*); *O'Brien* v. *Brown*, 409 U.S. 1, 4 n.1 (1972) (per curiam) (citing *Terry* v. *Adams*, *supra*; *Smith* v. *Allwright*, *supra*); see also *Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975) (en banc) (opinion of McGowan, J.) ("There are no racial or other invidious classifications here. If there were, the Party's entitlement to constitutional protection would be as slight as those of the victims would be strong.") (footnote omitted), cert. denied, 424 U.S. 933 (1976).[14]

[14] Under this Court's decisions, political parties have a constitutionally protected interest in deciding whether a party primary should be limited to party members or should be open to independent voters. See *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 215-216 (1986). Still, a party must preclear any decision to change from an open to a closed primary, or vice versa, see *Henderson* v. *Graddick*, 641 F. Supp. 1192, 1195, 1201 (M.D. Ala. 1986) (three-judge court) (per curiam). The Attorney General has on several occasions precleared parties' decisions to make such changes. These preclearance decisions include: Green Party of Alaska (June 25, 1992); Democratic Party of Alaska (Feb. 28, 1992); Republican Party of Alaska (May 21, 1991); Republican Party of Alaska (Sept. 18, 1990).

II. PRIVATE PARTIES MAY INVOKE THE REMEDIES AGAINST UNLAWFUL POLL TAXES IN SECTION 10 OF THE VOTING RIGHTS ACT

The three-judge court in this case held that private parties cannot avail themselves of the remedies against unlawful poll taxes in Section 10 of the Act. J.S. App. A11-A12. The court based that holding on the fact that (1) Section 10 does not expressly authorize private actions; and (2) Section 10 *does* expressly authorize actions by the Attorney General. The court's holding is at odds with this Court's decision in *Allen*.

In *Allen*, the Court held that private parties may obtain declaratory and injunctive relief against changes in voting that have not been precleared as required by Section 5. 393 U.S. at 555. The Court recognized that "[t]he Voting Rights Act does not explicitly grant * * * private parties" authority to enforce Section 5. 393 U.S. at 554. The Court found implicit authority for private enforcement, however, in the language of Section 5, analyzed "in light of the major purpose of the Act." 393 U.S. at 555. The Court reasoned that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557. Accordingly, the Court determined that "the specific references" in Section 12 of the Act, 42 U.S.C. 1973j, to actions by the Attorney General to enforce Section 5 "were included to

give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights," and not to bar private enforcement actions. 393 U.S. at 555 n.18.[15]

Allen strongly supports the conclusion that private parties may seek judicial enforcement of Section 10. Section 10 explicitly recognizes the right of each citizen to be free from unconstitutional poll taxes. 42 U.S.C. 1973h(a). That right likewise "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Allen*, 393 U.S. at 557. Accordingly, the provision in Section 10 authorizing enforcement by the Attorney General should be construed as giving her power to enforce "what might otherwise be viewed as 'private' rights," *Allen*, 393 U.S. at 555 n.18, and should not be construed to bar private enforcement of that Section.

In defending the district court's contrary holding, the Party observes that Section 10 does not create a substantive right to be free from poll taxes but instead merely provides a remedy for enforcing the proscription against poll taxes in the Fourteenth and Twenty-Fourth Amendments. Mot. to Affirm or Dismiss 16-17. That observation, while true, is beside the point. The Court in *Allen* rejected as irrelevant the argument that Section 5 did not create a substantive right but merely provided a remedy for violations of the Fifteenth Amendment (393 U.S. at 556 n.20):

> Appellees argue that § 5 * * * gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the

[15] Section 2 of the Act (42 U.S.C. 1973), like Section 5, does not expressly authorize private enforcement actions, and it is expressly enforceable by the Attorney General under Section 12. Although this Court has not explicitly addressed whether Section 2 authorizes private enforcement actions, it has repeatedly entertained such actions. See, *e.g.*, *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994).

> guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant.

Similarly, the fact that Section 10 does not confer any new right on individual voters—but only creates a remedy for violations of the Fourteenth and Twenty-Fourth Amendments—does not answer the question whether individual voters may avail themselves of that remedy. *Allen* dictates an affirmative answer to that question.[16]

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted.

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MARCH 1995

[16] We believe the dismissal of the Section 10 claim cannot be upheld on the alternative ground advanced by appellees, but not addressed by the three-judge court, that the Party's fee requirement is not a "poll tax." Mot. to Affirm or Dismiss 18. Appellants' complaint alleges a "poll tax * * * or substitute therefor" within the meaning of Section 10(b), 42 U.S.C. 1973h(b).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20054

No. 94-203

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Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
Appellees.

On Appeal From The
United States District Court
For The Western District Of Virginia

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLANTS

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March 9, 1995

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, the National Association For The Advancement Of Colored People (NAACP) respectfully submits this brief *amicus curiae* in support of Appellants. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of

the letters of consent have been lodged with the Clerk of the Court.

The NAACP is the oldest and largest civil rights organization in America. Founded in 1909, the NAACP was instrumental in the earliest battles for the franchisement of southern blacks through enforcement of the Fifteenth Amendment. The organization's perspective on the issue of discrimination in voting and access to the ballot is for this reason unique. This case raises questions directly bearing on the extent to which a state or one of its statutorily sanctioned political parties may alter unilaterally the form of selecting nominees for Congressional office, ostensibly a change "with respect to voting" under the Voting Rights Act of 1965 and one of the Act's most fundamental safeguards against infringement of the Fifteenth Amendment. Accordingly, this case has substantial public interest ramifications. We believe that our perspective will complement the brief of Appellants and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

The early history of efforts to enforce the Fifteenth Amendment witnessed an arrogant strategy by southern states to configure their electoral systems in ways which evaded the direct application of federal court decrees. Like the malevolent Proteus in Greek mythology† -- who eluded

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† *See* HOMER, ODYSSEY, Book IV, lines 451-456 (S.H. Butcher trans. 3d. ed. 1895) ("Now behold, at the first he turned into a bearded lion, and thereafter into a snake, and a pard, and a huge boar; then he took the shape of running water, and of a tall and flowering tree.")

restraint merely by changing shape -- certain states bent upon perpetuating the exclusion of blacks from the polls reacted to judicial enforcement of the Fifteenth Amendment by changing their electoral systems to accomplish the same unlawful objective in a different, more elusive form. The *White Primary Cases* illustrate this story in its most insidious manifestation.

After "nearly a century of systematic resistance to the Fifteenth Amendment," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), Congress passed the Voting Rights Act of 1965, designed "to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969). Under Section 5 of the Act, *any* change in "standard, practice, or procedure with respect to voting" requires prior approval, or preclearance. Section 5's preclearance requirement applies whether or not the change suggests, in the first instance, any discriminatory purpose. That *any* change affecting voting rights has occurred is a sufficient predicate to activate Section 5.

In 1990 the Republican Party of Virginia chose to make candidates for federal elective office subject to approval in a primary election of the voters. In 1994, the Party changed the nominating system to permit only those who had paid a $45 fee to participate in the selection of the Party's nominee. This abridgment of voting rights constituted a "change" within the meaning of Section 5 and thus required federal approval.

ARGUMENT

VIRGINIA'S CHANGE FROM A PRIMARY ELECTION SYSTEM TO A CONVENTION AT WHICH VOTERS MUST PAY A FEE AS A CONDITION OF PARTICIPATION IS A CHANGE "WITH RESPECT TO VOTING" UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 AND REQUIRES PRECLEARANCE.

A. Unilateral Changes In A State's Electoral System Demand The Most Careful Judicial Scrutiny.

1. Under the Constitution, the states exercise wide discretion in the formulation of systems by which their citizens choose representatives in Congress. U.S. Const. Art. I, § 2; Amend. XVII; *Ex Parte Yarbrough*, 110 U.S. 651, 663 (1884). The establishment of voter qualifications is a crucial step in this process. In an infamous era of our Nation's history, certain states structured their electoral systems in order to prevent blacks from having access to the polls. As courts began enforcing the Fifteenth Amendment, *post hoc* restructuring of electoral systems became the brazen strategy of states intent upon circumventing the Fifteenth Amendment's effect. Even when laboring under court oversight, the affected states often "merely switched to discriminatory devices not covered by the federal decrees." *South Carolina v. Katzenbach*, 383 U.S. at 313-314. Thus, the very flexibility accorded the states to fashion their own, preferred electoral systems -- and to change those systems when and how they pleased -- became the vehicle for continued oppression of blacks.

A typical stratagem of recalcitrant states was to recast their activities as private and voluntary, and thus assertedly beyond the reach of the courts. The history of the "white primary" illustrates the sinister dynamic in play when a state bent on abridging black access to the polls abused its constitutional right to change its electoral structure. Beginning in 1889, the Jaybird Democratic Association of Texas (Jaybird Party) held "unofficial" primary elections to select candidates for county offices. These candidates entered the Democratic party primary, were invariably nominated and then elected in a usually uncontested general election. White voters automatically became members; blacks were excluded. This "self-governing, voluntary club" was organized to disenfranchise blacks and circumvent the Fifteenth Amendment. *See* S. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969 23-54 (1976).

Initially, in *Newberry v. United States*, 256 U.S. 232(1921), the Court concluded that party primary elections were unknown to the framers and thus beyond the reach of the Constitution. Two years later, the Texas legislature enacted a statute expressly barring blacks from voting in a Democratic primary. In response, the Court in *Nixon v. Herndon*, 273 U.S. 536 (1927) held this measure invalid under the Fourteenth Amendment. The Texas legislature reacted with another statute that authorized the state party executive committee to determine membership qualifications, including race. That statute was held invalid in *Nixon v. Condon*, 286 U.S. 73 (1932). In response to *Condon*, the Texas legislature repealed all state primary election statutes, anticipating that the Democratic state convention would exclude blacks, a gambit the Court upheld in *Grovey v. Townsend*, 295 U.S. 45 (1935) as "private" discrimination beyond the Constitution.

Not until *Smith v. Allwright*, 321 U.S. 649 (1944), when the Court overruled *Grovey*, did the white primary

finally end. In a suit sponsored by the NAACP, the Court deemed the Texas primary system an integral part of the state's election procedures, meaning citizens had the right under the Fifteenth Amendment to vote in primary elections free of racial discrimination. The discrimination was not merely "private." Since state law authorized primary elections and regulated the party's procedures, the party in convention acted as an agent of the state in excluding blacks. "The privilege of membership in a party may be, as this Court said in [*Grovey*], no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State." *Smith v. Allwright*, 321 U.S. at 664. The rationale of *Allwright* was extended in *Terry v. Adams*, 345 U.S. 461 (1953) when the Court invalidated an unofficial primary held by a private, all-white "club" despite the lack of state regulation of the club.

The states' repeated efforts to preclude blacks from the ballot by manipulating their electoral systems is thus the tragic historical context of any case challenging unilateral changes affecting voting rights. The most salient lesson of the *White Primary Cases* -- that states with a history of racial discrimination would effect electoral changes in order to perpetuate in one form what had been declared unlawful in another -- informed the structure of the Voting Rights Act of 1965. *See* LAWSON, *supra.*

2. Congress adopted the Act in 1965 to implement the Fifteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and to "erase the blight of racial discrimination in voting." *U.S. v. Board of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 117 (1978). The danger of states restructuring their electoral systems for discriminatory

purposes led to the Act's "stringent remedies aimed at areas where voting discrimination has been the most flagrant." *South Carolina v. Katzenbach*, 383 U.S. at 315. Congress resorted to these extraordinary measures because experience had shown them to be necessary to eradicate the "insidious and pervasive evil of [racial discrimination in voting] that had been perpetuated in certain parts of the country." *Id.* at 309. Earlier efforts to end this discrimination by facilitating case-by-case litigation had proved ineffective.

The structure and operation of the Voting Rights Act are straightforward. The statute requires federal approval of *all* changes in the method of election in "covered" jurisdictions -- those identified as having a record of minority disenfranchisement by an arguably questionable formula. 42 U.S.C. 1973b. In the past, States and the political units within them had responded to federal decrees outlawing discriminatory practices by "resort[ing] to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . ." *South Carolina v. Katzenbach*, 383 U.S. at 335. In order to ensure that covered states did not pass new legislation to obstruct black voter registration or to dilute the expected emergent voting strength of blacks, the states were prohibited by Section 5 of the Act from enacting any change in "voting qualifications or prerequisites to voting, or standard, practice or procedure with respect to voting" without first obtaining clearance from the Attorney General or a federal district court in Washington, D.C. 42 U.S.C. 1973c. Thus, these states -- including Virginia -- had the affirmative burden to secure federal permission to change their voting laws. To prevent any future circumvention of constitutional policy, a designated State or political subdivision wishing to change its voting laws must demonstrate

that the change will be nondiscriminatory. "By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims." *Sheffield*, 435 U.S. at 117.

The Court's decisions have given Section 5 the broad, searching scope suggested by the language of the Act. In *Allen v. State Board of Elections, supra*, the Court's examination of the Act's objectives and original legislative history yielded the conclusion that Section 5 should be given "the broadest possible scope," 393 U.S. at 567, and prior federal scrutiny should be had of "any state enactment which altered the election law in a covered State in even a minor way." *Id.* at 566.

Thus, the Court has required federal preclearance of laws changing the location of polling places, *see Perkins v. Matthews*, 400 U.S. 379 (1971); laws adopting at-large systems of election, *ibid*; laws providing for the appointment of previously elected officials, *Bunton v. Patterson*, 390 U.S. 978(1968)(decided with *Allen, supra*); laws regulating candidacy, *Whitley v. Williams*, 390 U.S. 1009 (1968)(decided with *Allen*); laws changing voting procedures, *Allen, supra*; annexations, *City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 410 U.S. 962 (1973); and reapportionment and redistricting, *Beer v. United States*, 425 U.S. 130 (1976). In each case, "federal scrutiny of the proposed change was required because the change had the potential to deny or dilute the rights conferred by" the Act. *Sheffield*, 435 U.S. at 118.

3. Indeed, of principal concern to Congress when it extended the Voting Rights Act in 1982 was "the prevalence of changes that were implemented without preclearance and, in some cases, were not submitted to the Attorney General until years later." *NAACP v. Hampton County Election Com'n*, 470 U.S. 166, 176 (1985). *See* S.Rep. No. 417, 97th Cong., 2d Sess. 12, 14 n. 43 (1982); H.R.Rep. No. 227, 97th Cong., 1st Sess. 13 (1981), *reprinted in* 1982 U.S.Code Cong. & Admin.News 177, 189, 191, 192. The Senate Report stated:

> Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law. The Supreme Court has recognized that enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance. The extent of non-submission documented in both the House hearings and those of this Committee *remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after, when sued or threatened with suit.* Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

S.Rep. No. 417, *supra*, at 47-48, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 225, 226 (emphasis added). The legislative history of the most recent extension of the Voting Rights Act reveals Congress' firm commitment to its continued vigorous enforcement. The Senate Committee found "virtual unanimity among those who had studied the record," S.Rep. No. 417, *supra* at 9, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 186, that Section 5 should be extended. Further, Congress spe-

cifically endorsed a broad construction of Section 5, as it had in previous extensions of the Act.

Although the Fifteenth Amendment is "self-executing," *Guinn v. United States*, 238 U.S. 347, 362-363 (1915), the Court cautioned long ago that the right to be free from racial discrimination in voting "should be kept free and pure by congressional enactment whenever that is necessary." *Ex Parte Yarbrough*, 110 U.S. at 665. The intensity of the struggle for the realization of this constitutional guarantee -- and the national aspirations which hung in the balance if Congressional intervention, in the end, were anything short of extraordinary -- are values writ large in the 1965 Act. Further efforts by the states to circumvent the law by recasting their electoral systems with impunity until they were challenged in court, would be precluded by an approach which shifted the burden to the states to demonstrate that changes in their systems were not discriminatory. The instant case must be resolved with this historical context in mind.

B. The Party's Decision To Change From A Primary To A Convention System Required Preclearance.

1. Under the laws of Virginia a political party may select its senatorial nominee by a primary election or by other means. Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993). Section 24.2-511 of the state code accords the Virginia Republican Party preferential access to the general election ballot for its nominee. The candidate selection process in *Smith v. Allwright, supra*, included the same state involvement.

Over the course of time, the Virginia Republican Party has used various means to select its senatorial nominees, most recently by convention. In 1990, the Party decided to select its nominee at a primary election, but the election was canceled when no one challenged the Party's incumbent.

For the 1994 senatorial election, the Party decided to select its nominee at a convention, the delegates to which were identified at local "mass meetings" and required to pay a nonrefundable fee to the Party. The practice of charging the fee was not in effect on November 1, 1964. Nevertheless, the Party has never sought preclearance of the fee under Section 5 of the Act, nor sought preclearance to convert from the primary to the convention format.

2. The district court concluded that the imposition of the fee is not subject to Section 5's preclearance requirement. "The Party is not conducting primary elections. Instead local party members are selecting delegates to the state nominating convention, not through an election, but through local conventions, mass meetings, and party canvasses. This distinction is meaningful." 853 F. Supp. at 216. In reaching its conclusion, the district court relied upon 28 C.F.R. 51.7, the Department of Justice regulation promulgated pursuant to Section 5. This regulation provides (*ibid.*, emphasis added):

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For

example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. *Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5.*

The district court reasoned that the acts of the Party are not subject to preclearance because "there is no doubt that the Party is not conducting a primary election, and there is no voting as defined." 853 F. Supp. at 216.

The district court's analysis was flawed. A "change[] with respect to the conduct of primary elections," 28 C.F.R. 51.7, plainly has occurred. In 1990 the Party decided to choose its nominee by primary, a process open to all eligible voters. By 1994 the process had been changed to require that a person desiring to have a vote in the selection of his or her party's candidate pay a $45 fee to purchase the title of "delegate." When the State of Virginia permitted the Party to establish a system of open primary elections, the party selection process became a state action granting the right to vote. That right was abridged by eliminating the primary process and replacing it with a process by which a voter had to pay a $45 fee to become a delegate. As such, the change was one subject to Section 5.

The district court's argument that the present delegate system is not subject to Section 5 because "voting" means voting in a public election, not participation in a party convention, is specious. First, the Voting Rights Act itself does not limit its scope to primary or general elections. The Act refers not to "elections" but to "voting," a more encompassing term. Second, although the Justice

Department's regulations refer to "primary elections," this language is by way of "example" and was not intended to be an exhaustive description of the Act's scope. 28 C.F.R. 51.7. In 1990, the right to "vote" in a party primary was the right of all qualified to vote. The right to "vote" in a party nominating convention as abridged in 1994 included only those who could pay to do so.

We do not suggest nor was it alleged below that the Party's restructuring of its primary system had a discriminatory purpose -- only that the procedures set forth in the Act were not observed. So long as "[t]he power of a citizen's vote is affected," irrespective of whether "[s]uch a change could be made without discriminatory purpose or effect," the State must "submit such changes to scrutiny." *Allen v. State Board of Elections*, 393 U.S. at 569-570. Accordingly, it is not the Court's "province, nor that of the district court below, to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or the District Court for the District of Columbia." *Hampton County Election Com'n*, 470 U.S. at 181.

Changes made to the electoral system without preclearance are not legitimated by the passage of time. Nor would subsequent iterations from the 1990 primary system bar the present system's being compared with the 1990 version to determine whether there has been compliance with the Act. Were this a reasonable interpretation, the following language in Section 5 would have no meaning: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under

this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure." 42 U.S.C. 1973c. The fact that one or more successive changes in the Party's process for selecting candidates has occurred without preclearance, does not mean that either the current method of selecting candidates, nor the method preceding it were valid.

For the same reasons, the district court's characterization of the Party's process as a "convention" and the court's reliance upon this "distinction" as "meaningful," 853 F. Supp. at 216, is irrelevant. It cannot rationally be disputed that the act of replacing a primary election by a convention is not covered by Section 5. The district court's crucial premise -- that having abandoned primary elections and instituted a "convention," appellees were free of all further preclearance obligations -- is belied by the history of the Voting Rights Act. No meaningful federal oversight would be possible if parties had the unilateral discretion to restructure their primaries as conventions, reserving the power to impose restrictions on participation that would not have been approved had the preclearance procedure been followed. The harsh lesson of the *White Primary Cases* -- memorialized by Section 5 of the Act -- is that *any* changes affecting voting rights in state electoral systems must be reviewed.

Even minor changes in voting procedures trigger the Act. In *Hampton County Election Com'n*, the election commission did not dispute that a change in the date of an election, if effected by statute, required preclearance. 470 U.S. at 178. Rather, the commission argued that because the rescheduling was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the

requirements of Section 5. The Court rejected this approach. "[P]lainly, *the form of a change in voting procedures* cannot determine whether it is within the scope of Sec. 5. That section reaches informal as well as formal changes, ... If it were otherwise, States could evade the requirements of Sec. 5 merely by implementing changes in an informal manner." *Id.* at 185 (emphasis added).

Analytically, the district court's decision reduces to an absurdity. Under the district court's logic, the Party could have conditioned participation in the state convention on any number of variables that would be indefensible if scrutinized by the Attorney General -- *including* a voter's race. To diminish that risk, "*any change* affecting voting, ... must meet the Section 5 preclearance requirement," 28 C.F.R. 51.11(emphasis added), because "neither the absence of discriminatory purpose nor a good-faith implementation of a change removes the potential for discriminatory effects." *Hampton County Election Com'n*, 470 U.S. at 181. This is so categorical a requirement that it applies "even though [the change] appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change." *Ibid.* For this reason, it should be self-evident that the Party's change from a primary to a convention system was subject to Section 5 preclearance.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS S. MORSE, *et al.*,
Appellants,

v.

THE REPUBLICAN PARTY OF VIRGINIA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Virginia

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BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal rights of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Holder v. Hall*, 114 S. Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985), and as *amicus curiae*, *see, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986). The ACLU is providing representation to the appellants in *Abrams v. Johnson*, No. 94-797, *prob. juris. noted*, 63 U.S.L.W. 3499 (Jan. 6, 1995).

The issues presented in this appeal are of great importance to the *amici*'s work on behalf of minority voters throughout the nation. *Amici* believe that the three-judge court below erred fundamentally in refusing to apply Section 5 to the voting practices at issue here, and thereby invited manipulation that will threaten the preclearance process and the fundamental rights it protects. *Amici* are also particularly concerned about the three-judge court's overly restrictive approach to private enforcement under the Voting Rights Act. In refusing to recognize a private right of action to enforce Section 10 of the Act, the court below employed an analysis with dangerous implications for the Voting Rights Act generally.

Affirmance of the three-judge court's approach to the issue of private rights of action would seriously impair the ability of the Lawyers' Committee and the ACLU to vindicate the rights of the minority citizens they represent throughout the nation. *Amici* therefore have a substantial interest in the outcome of this case, and this brief will address the issue of private rights of action under the

Voting Rights Act generally and Section 10 of the Act in particular.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two important questions under the Voting Rights Act: whether the decision of a political party to require voters to pay a fee to participate in a convention for nominating a candidate for United States Senate is a "change with respect to voting" within the meaning of Section 5 of the Act, 42 U.S.C. § 1973c, and whether a voter may bring a private action under Section 10 of the Act, the anti-poll tax provision, 42 U.S.C. § 1973h.

The three-judge district court's ruling on both questions should be reversed. The court's cursory analysis reflected no grasp of our nation's long and difficult history of disenfranchisement of minority voters, and showed scant regard for the practical demands of effective administration of the Act. *Amici* fully agree with the conclusion of appellants on the Section 5 issue. This brief will focus on the district court's erroneous interpretation of Section 10 —the poll tax provision. Although Section 10 is not frequently invoked by private litigants, the three-judge court's analysis of whether a private cause of action exists under that provision threatens private enforcement of the Act generally, and must be rejected.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), and no mechanism is more important for securing that right than private enforcement of the Voting Rights Act. Indeed, the availability of private causes of action to enforce the Act is well established. Private litigants have instituted the overwhelming majority of Voting Rights Act lawsuits, and have achieved the overwhelming majority of the judg-

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court.

ments and decrees reforming discriminatory voting practices. This Court has expressly held that Section 5 of the Act provides a private cause of action, *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and has repeatedly adjudicated private causes of action under Section 2 of the Act—without ever intimating the slightest doubt as to the propriety of private enforcement. *See, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647 (1994).

Against this backdrop, the three-judge court's refusal to recognize a private cause of action under Section 10 of the Act stands out as aberrant. Section 10 enforces the fundamental right of citizens to be free from the illegal exaction of payment as a condition for participating in the democratic process—a right guaranteed by both the Equal Protection Clause of the Fourteenth Amendment and the Twenty-fourth Amendment. *See Harman v. Forsennius*, 380 U.S. 528 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Denying individual citizens the ability to vindicate under Section 10 what is, at its core, a private individual right, *Allen*, 393 U.S. at 555, n.18, is antithetical to the statutory structure, the prevailing practice, and the high purposes of the Voting Rights Act.

ARGUMENT

I. THE EXISTENCE OF PRIVATE CAUSES OF ACTION UNDER THE VOTING RIGHTS ACT IS WELL-ESTABLISHED AND CRITICAL TO ACHIEVING THE ACT'S PURPOSES.

The availability of private causes of action to enforce the Voting Rights Act is well-established, as is the practical need for private enforcement.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court squarely held that a private cause of action exists to enforce the preclearance requirements of Section 5. As the Court noted, Section 12 of the Act, 42 U.S.C. § 1973j, grants the Attorney General express statutory authority to enforce Section 5's substantive and procedural requirements respecting changes in voting practices, and "does not explicitly grant or deny private parties" a cause of action. *Id.* at 554. Nevertheless, interpreting Section 5 "in light of the major purpose of the Act," the *Allen* Court had no difficulty concluding that Congress intended to create a private enforcement mechanism. *Id.* at 555. The Court recognized that Section 5 specifically created a private right in every citizen—providing that "no person" should be denied the right to vote by a procedure that had not been precleared. *Id.* at 555, 557.

According to the Court, "the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." *Id.* at 555, n.18. As the Court noted, the jurisdictional provision of the Act, 42 U.S.C. § 1973j(f), quite clearly contemplated private enforcement by vesting jurisdiction in the district courts "'without regard to whether *a person* asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.'" 393 U.S. at 555, n.18 (emphasis in original). Indeed, as *Allen* suggested, the express authorization for enforcement by the Attorney General might have been necessary to confer an enforcement authority that this jurisdictional provision did not expressly recognize.

Allen recognized that Congress enacted the Voting Rights Act because "existing remedies were inadequate to accomplish" the purpose of preventing discrimination by the States in the administration of voting laws. *Id.* at 556. However, whether the Act was viewed as creating new remedies for existing rights or creating new rights, the "inquiry remains whether the right or remedy has been conferred upon the private litigant." *Id.* at 556, n.20. The Court also recognized that vesting sole enforcement authority in the Attorney General would perpetuate the very problem of inadequate enforcement the Act was designed to ameliorate. As the Court noted, "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."

Id. at 556. Indeed, *Allen* observed that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557.

That observation is unassailable. The sheer numbers of federal, state, county and local offices, as well as the boundless ingenuity of those seeking to forestall the transformations sought by the Voting Rights Act, mandate private enforcement. *Allen* was plainly correct in concluding that the Act's purposes are best advanced by recognizing the right of those most directly affected to challenge unlawful voting practices.

Nor is there any serious question that Section 2 of the Act authorizes private enforcement, even though the statutory text of Section 2—like that of Sections 5 and 10—does not expressly create a private cause of action. Since *Allen*, thousands of private plaintiffs have filed Section 2 actions. No court has ever held that Section 2 does not confer a private cause of action. This Court has repeatedly adjudicated Section 2 cases without ever suggesting that private persons lacked the ability to enforce that provision. *See, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

That the routine availability of private causes of action accords with congressional intent is not open to doubt. Indeed, a present challenge to private causes of action comes far too late. Congress has repeatedly amended the Voting Rights Act in the wake of *Allen*, without ever intimating any disagreement with *Allen*'s endorsement of private enforcement. To the contrary, the legislative history of the 1970 and the 1982 amendments to the Act expressly endorse private enforcement. *See* H.R. Rep. No. 397, 91st Cong., 2d Sess. at 8, *reprinted in* 1970 U.S. Code Cong. & Admin. News 3277, 3284 (endorsing *Allen* regarding "the need for private policing"); S. Rep. No. 417, 97th Cong., 2d Sess., pt. 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 208 ("reiterat[ing]

the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965"). *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982) ("When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, . . . the question is whether Congress intended to preserve the pre-existing remedy."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Lorillard v. Pons*, 434 U.S. 575, 579-81 (1978).

Other provisions of the Act presuppose the existence of private enforcement. For example, Title IV of the 1975 amendments to the Act authorized federal courts to award attorney's fees to "the prevailing party, other than the United States," in any action brought under the Voting Rights Act. Pub. L. No. 94-73, Title IV, § 402, 89 Stat. 404 (1975) (codified at 42 U.S.C. § 1973*l*(e)). That provision obviously presupposes and ratifies private rights of action. *See generally Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 112 S. Ct. 1028, 1035-36 (1992) (Congress may ratify judicially inferred private rights of action by subsequent legislation premised on existence of private action); *id.* at 1039 (Scalia, J., concurring in the judgment) (same).

The legislative history of the 1975 amendments is suffused with references to the importance of private enforcement, and to the need to afford private parties the same remedies the Act already afforded to the Attorney General. *See, e.g.*, 121 Cong. Rec. 16268 (statement of Rep. Drinan) (speaking of the necessity to "provide a dual enforcement mechanism in the voting field"). The House Judiciary Subcommittee relied upon a report of the United States Commission on Civil Rights, which recommended:

> *Congress should provide for the awarding of attorneys' fees where appropriate in private litigation to enforce the Voting Rights Act or rights guaranteed by the Fifteenth Amendment.*

> Much of the burden of voting rights litigation has fallen on private parties. The litigation is expensive and the individuals and organizations who are parties to it often cannot bear the sustained financial strain. Some Federal courts award attorneys' fees in this type of litigation, but others do not. A provision for attorneys' fees similar to that in Titles II and VII of the Civil Rights Act of 1964 should be enacted.

Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 969, 1336 (1975) (Appendix 2—U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, p. 353 (1975) (emphasis in original); *see also Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 40, n.9 (1978) (House and Senate Judiciary Committees "relied heavily" on the Commission's report).

On the floor of the House, the bill's manager explained that "[t]he awarding of such fees is important in the area of voting rights because of the significant role which private citizens must play in their enforcement." 121 Cong. Rec. 16254 (1975) (statement of Rep. Edwards of Cal.). Similarly, the author of the attorney's fee section of the bill called that provision "extremely important" to "the dual enforcement scheme" envisioned by the Act. *Id.* at 16268 (statement of Rep. Drinan); *see also id.* at 16268-69 (statement of Rep. Drinan) ("We cannot expect private litigants, especially minorities, to bear the tremendous costs of instituting suit to remedy unlawful voting practices."); *id.* at 16915 (statement of Rep. Rangel) (noting that fee-shifting provision " 'will assist private litigants in vindicating their rights [and] will be of particular benefit to poor black voters and candidates in the south and elsewhere who often cannot afford the cost of fulfilling their rights under the law' " (quoting a letter from the president of the National Bar Association)).

The Senate Report on the 1975 amendments explained that in voting rights cases

> Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights.
>
> . . . "[P]rivate attorneys general" should not be deterred from bringing meritorious actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.

S. Rep. No. 295, 94th Cong., 1st Sess., at 39-41, *reprinted in* 1975 U.S. Code Cong. & Admin. News 807-08 (footnote omitted).

When President Ford signed the 1975 amendments into law, he highlighted the importance of private rights of action:

> [T]his bill will permit private citizens, as well as the Attorney General, to initiate suits to protect the voting rights of citizens in any State where discrimination occurs. There must be no question whatsoever about the right of each eligible American, each eligible citizen to participate in our elective process. The extension of this act will help to ensure that right.

President's Remarks Upon Signing the Voting Rights Act Extension Into Law, 11 Weekly Comp. Pres. Doc. 837 (Aug. 6, 1975).

Congress's creation and ratification of private rights of action under the Voting Rights Act has a firm foundation in practical necessity. Private enforcement has proved indispensable to the effective implementation of the Act since its inception. Passage of the Act in 1965 inspired a wave of private litigation seeking to vindicate minority citizens' fundamental constitutional right to vote. *See* Frank R. Parker, *Black Votes Count: Political Em-*

powerment in Mississippi after 1965, at 81-82 (1990);[2] Peyton McCrary, Jerome A. Gray, Edward Still & Huey L. Perry, *Alabama, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 38, 49-50 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *Quiet Revolution*].

According to the Administrative Office of the United States Courts, a total of 3,656 voting cases were filed in federal district court from July 1, 1976, to September 30, 1993.[3] Of those, the United States was the plaintiff in 174—a mere 4.8%. Remarkably, the United States was the *defendant* in federal voting cases almost as often as it was the plaintiff.[4] Private plaintiffs filed nineteen voting rights cases for every one filed by the Department of Justice. In 1992—the first post-census year of redistricting in the aftermath of the 1982 amendments and *Thornburg v. Gingles, supra* (interpreting the 1982 amendments to Section 2 of the Act)—that ratio climbed to *53 to 1*.

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[2] Now black plaintiffs had their own lawyers who resided in the state and who developed alliances with their clients; who were familiar with local conditions; who developed a certain level of credibility even with hostile local federal judges by repeatedly getting their decisions reversed on appeal; and who, by repeatedly filing the same kinds of cases and exchanging information and litigation techniques among themselves, developed a high level of expertise in civil rights litigation that gave their clients an advantage.
Id.

[3] The category of "voting cases" encompasses some actions brought under other provisions of law, but the large majority were brought under the Act. *See* Frank R. Parker, *Voting Rights Enforcement in the Reagan Administration, in One Nation, Indivisible: The Civil Rights Challenge for the 1990s*, at 362, 368 (Reginald C. Govan & William L. Taylor eds., 1989).

[4] The United States may be named as a defendant in Section 5 preclearance cases, bailout cases, and the like. *See* Parker, *supra* note 3, at 368.

VOTING CASES FILED IN FEDERAL COURT, BY YEAR AND PARTY[5]

Year	Total	Private Pl.	U.S. As Pl.	U.S. As Def.
1993	213	188	14	11
1992	494	473	9	12
1991	197	180	10	7
1990	130	114	10	6
1989	183	167	11	5
1988	347	327	11	9
1987	214	195	12	7
1986	194	178	12	4
1985	281	259	17	5
1984	259	240	10	9
1983	175	168	1	6
1982	170	155	4	11
1981	152	135	8	9
1980	160	147	6	7
1979	145	125	13	7
1978	139	123	11	5
1977	203	179	15	9
Total	3656	3353	174	129

Moreover, the suits filed by private plaintiffs were every bit as successful as those filed by the Government, as demonstrated by a recent empirical study of the impact of the Act in eight southern states. *See Quiet Revolution, supra.*[6] A team of twenty-five attorneys, social

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[5] The statistics contained in this table and in the preceding paragraph come from Table C-2 of the Annual Reports of the Director of the Administrative Office of the United States Courts, for 1977 to 1993. Prior to 1977, the reports did not separate voting cases from other civil rights actions. Data for 1994 is not yet available. Beginning with the 1992 report, the Administrative Office tabulated its statistics for the year ending September 30, rather than the year ending June 30. Thus, the 1992 figures appear somewhat inflated because they cover fifteen months.

[6] The study encompassed the eight southern states covered entirely or in substantial part by the Act's Section 5 preclearance provision: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.

scientists, and historians funded by the National Science Foundation conducted a comprehensive survey of all lawsuits that challenged at-large district systems in towns,[7] cities, and counties,[8] in the 1970s and 1980s. The survey found 250 municipalities and counties that had changed their electoral systems in response to voting rights litigation, typically by replacing at-large elections with single-member district systems or with mixed plans that were hybrids of at-large and single-member. Of those 250 changes, only 5.2% resulted from suits initially filed by the Department of Justice. The remainder—almost 95%—resulted from private enforcement actions.[9] Thus, private plaintiffs not only file the overwhelming majority of all voting rights cases—they bring the very suits that succeed in eliminating the discriminatory electoral practices the Act sought to eradicate.

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[7] In all eight states covered by the survey, towns with 1980 populations of 10,000 or more were studied. In addition, smaller towns were studied in Alabama (6,000 or more population), Louisiana (2,500 or more), and Mississippi (1,000 or more). *See Quiet Revolution, supra*, at 61 Table 2.8 (Alabama), 133 Table 4.8A (Louisiana), 151 Table 5.8 (Mississippi).

[8] The survey covered counties in Georgia, North Carolina, and South Carolina, but not in the other five states. *See Quiet Revolution, supra*, at 389, n.6.

[9] CHANGES FROM AT-LARGE TO DISTRICT OR MIXED PLANS ATTRIBUTABLE TO VOTING RIGHTS ACT LITIGATION

	Successful Private Plaintiff Cases	Successful Cases With U.S. As Plaintiff
Municipalities	157	6
Counties	80	7

See Quiet Revolution, supra, at 61-64 Table 2.8 (Alabama), 99-100 Table 3.8 (Georgia), 133 Table 4.8A (Louisiana), 151-52 Table 5.8 (Mississippi), 188-89 Tables 6.8 & 6.8A (North Carolina), 226-30 Tables 7.8 & 7.8A (South Carolina), 264-68 Table 8.8 (Texas), 297 Table 9.8 (Virginia); Tables Z, Chapters 2-9 (supplementary unpublished database, archived at the International Consortium for Political and Social Research, University of Michigan).

The two social scientists who coordinated the study concluded that, in the 1980s,

> [t]he vast bulk of section 2 actions were brought by minority plaintiffs, often acting through civil rights or civil liberties organizations. Within the eight states covered by our survey, section 2 litigation brought solely by the Department of Justice played only a minor role in effecting changes in local election systems. One of the most remarkable results of amended section 2, therefore, is its encouragement of the private bar to take a major role in enforcing public voting rights law. This fact cannot be emphasized too strongly.

Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction, in Quiet Revolution, supra*, at 378, 385 (footnote omitted).

These conclusions should come as no surprise to the Court. Many advances in voting rights jurisprudence, and many significant steps on the path toward equal opportunity for effective political participation, have resulted from cases originally brought by private plaintiffs and ultimately decided by this Court. *See, e.g., Chisom v. Roemer*, 501 U.S. 380 (1991); *Clark v. Roemer*, 500 U.S. 646 (1991); *Thornburg v. Gingles, supra*; *Dougherty County Bd. of Educ. v. White, supra.*

In light of the long and consistent history of express recognition of private rights of action under the Voting Rights Act, as well as the primary role of private enforcement in effectuating the Act's high purposes—a history utterly ignored by the three-judge court below—the proper question in this case is whether any persuasive reason exists for treating Section 10 differently from the other key provisions of the Act. As we will show, the answer to that question is no.

II. A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE SECTION 10 OF THE VOTING RIGHTS ACT.

A. The Text Of The Voting Rights Act Of 1965 Is Properly Read As Creating A Private Right Of Action For Enforcement Of Section 10.

The three-judge court refused to recognize a private right of action under Section 10 because the text of that provision authorized enforcement by the Attorney General without mentioning private citizens. 42 U.S.C. § 1973h. Appellees defend this ruling on the different ground that Section 10 creates no statutory prohibition of poll taxes, but merely directs the Attorney General to file actions attacking poll taxes. Appellee's Supplemental Brief at 9-10. Neither analysis withstands scrutiny.

The district court's cursory analysis flies in the face of *Allen v. State Board of Elections, supra.* Indeed, Section 5 of the Act is indistinguishable from Section 10 in the respects identified by the district court, and the district court provided no reason for failing to follow *Allen* in this case. By holding the absence of express authorization dispositive, the district court made the mistake of measuring congressional intent respecting private causes of action by the standards of the present time rather than the time when Section 10 was considered.

As this Court first recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and reiterated in *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. at 1032, Congress's intent respecting private causes of action should be evaluated on the basis of the law as it existed when the statute was being considered. *Cannon*, 441 U.S. at 698-99 (decision whether a private right of action has been granted by Congress "must take into account . . . contemporary legal contest" [*sic*]); *Franklin*, 112 S. Ct. at 1036 ("same contextual approach" used to determine whether particular remedy exists for private right of action). This Court's jurisprudence respecting implied causes of action has evolved considerably over

the past 30 years. *Compare J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), *with Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994). But the Voting Rights Act was passed in the wake of this Court's ruling in *Borak*, which established a broad presumption favoring private rights of action based on the underlying "purpose" served by a statute. *Borak*, 377 U.S. at 431-32. That presumption has been repeatedly held to apply with particular force to civil rights statutes. *See, e.g., Cannon*, 441 U.S. at 717 (private right of action exists under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (private right of action exists under 42 U.S.C. § 1982); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.) (private right of action exists under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d), *cert. denied*, 388 U.S. 911 (1967).

As *Cannon* holds, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with" such background norms when it considered a particular statute, *Cannon*, 441 U.S. at 699, and that Congress "expected its enactment to be interpreted in conformity with them." *Id.* Section 10 of the Voting Rights Act, passed fourteen months after the *Borak* decision, must be read in the same context. *Cf. Allen*, 393 U.S. at 557 (*Borak* constitutes an independent basis for finding a private right of action under Section 5).

Appellees' alternative argument—that Section 10 created no substantive rights—raises more difficult issues. On the one hand, the 1965 Act contains a number of structural indications that Congress intended Section 10 (which is codified at § 1973h) to be a substantive statutory right protecting individual voters from poll taxes. *See* 42 U.S.C. § 1973j(a) (establishing criminal sanctions for persons who "deprive or attempt to deprive any person of any *right* secured by section . . . 1973h") (emphasis added); *id.* § 1973j(c) (referencing "any *right* secured by section . . . 1973h") (emphasis added); *id.*

§ 1973j(d) (referring to persons who have engaged "in any act or practice prohibited by section . . . 1973h"). This evidence doubtless explains why courts—including this Court—have routinely assumed that Section 10 affirmatively prohibits poll taxes. *Cf. Allen*, 393 U.S. at 563 (Section 10 "prohibits the collection of poll taxes as a prerequisite to voting"); *City of Richmond v. United States*, 422 U.S. 358, 380 & n.3 (1975) (Brennan, J., joined by Douglas & Marshall, JJ., dissenting) (Congress had "banned or restricted the use of many . . . discriminatory devices," including "poll taxes."); *Houston v. Haley*, 859 F.2d 341, 343 (5th Cir. 1988) (Section 10 "prohibited" poll taxes); *Powell v. Power*, 436 F.2d 84, 86, n.4 (2d Cir. 1970) (Section 10 "abolished" poll taxes).

On the other hand, the text of Section 10 itself is ambiguous as to the existence of such a right. And the legislative history to the original 1965 Act does not manifest a clear congressional intent to create such a statutory right. Because this Court had not yet ruled on the constitutionality of poll taxes at the state level, Congress was careful not to pretermit constitutional consideration of the issue by creating a definite statutory prohibition.[10] Such an approach also had the virtue of avoiding what was perceived as a difficult constitutional question whether Congress possessed the power to forbid poll taxes on the state level in the absence of a judicial declaration of their unconstitutionality.[11] The version of Section 10 that was eventually enacted appears to be a compromise. In light of the legislative materials, the most plausible reading of the eventual text of Section 10 is that Congress in 1965 created a statutory right to be free of poll taxes to the extent that poll taxes were invalid as a mat-

[10] *See, e.g.*, 111 Cong. Rec. 9931 (1965) (letter from Attorney General Katzenbach to Senator Mansfield respecting pendency of *Harper v. Virginia Bd. of Elections*).

[11] H.R. Rep. No. 439, 89th Cong., 1st Sess., at 29, 36, 43-46, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2465, 2472, 2479-82.

ter of federal constitutional law—but was unwilling to go further in advance of a final judicial determination of the question.[12]

That reading of Section 10 is relevant to the question of whether a private right of action existed as of passage of the Act in 1965 for particular challenges to poll taxes, but is hardly dispositive of the issue before this Court. To begin with, as of 1965, the Twenty-fourth Amendment had already outlawed poll taxes in federal elections. Thus, the particular private cause of action asserted here would properly have been recognized even in 1965.[13]

[12] In a letter to the Senate Majority Leader, the Attorney General referred to the provisions that became subsections 10(a) and 10(b) of the Act:

> "Without question, [those two provisions] *encompass* the 14th and 15th amendments as well as any other provisions of the Constitution which might be relevant to an adjudication of the constitutionality of the poll tax."

111 Cong. Rec. 11016 (statement of Sen. Mansfield (quoting from a May 19, 1965 letter from the Attorney General to the Senate Majority Leader)) (emphasis added). The conference committee endorsed that approach when it expressly amended Section 10 to "make[] clear" that Congress was exercising its full authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Conf. Rep. No. 711, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2578, 2580; *see* 42 U.S.C. § 1973h(b) (1965).

[13] Neither the legislative history for the 1965 Act, nor this Court's holding in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), is to the contrary. The exaction of a payment in order to vote in *state elections* was ruled unconstitutional in *Harper*, seven months after enactment of the Voting Rights Act. But the Twenty-fourth Amendment to the Constitution, which prohibits the exaction of a poll tax for voting in *federal elections*, the precise subject at issue in this case, was ratified on January 23, 1964, more than 18 months prior to enactment of the Act. While the legislative history of the 1965 Act does evidence concern about the constitutionality of a poll tax ban for state elections, the Twenty-fourth Amendment removed all doubt that Congress had the authority, which it exercised in the Voting Rights Act of 1965, to ban poll taxes for voting in federal elections.

In any event, the most appellees have established is that a private right of action did not exist as of 1965 for applications of the poll tax which had not yet been declared unconstitutional by the courts. However, because Section 10 affords a statutory protection against poll taxes coextensive with federal constitutional protection, there is no reason to think Congress intended in 1965 to preclude private enforcement of such a right once the substantive constitutional invalidity of a state poll tax had been definitively established. To the contrary, as discussed *supra*, there is every reason to think that Congress intended private enforcement of the rights protected by Section 10, just as it plainly envisioned private enforcement of the rights protected by other provisions of the Act.

B. Any Doubt As To The Existence Of A Private Right Of Action Was Removed By The 1975 Amendments To The Act.

Whatever the status of a private citizen's rights under Section 10 as originally enacted, the 1975 amendments to the Act remove any doubt as to the existence of a private cause of action to enforce the anti-poll tax provision. On August 6, 1975, several temporary provisions of the Voting Rights Act of 1965 were set to expire, *see, e.g.*, 42 U.S.C. § 1973b(a) (1970), and Congress was faced with the question whether to renew them. Although Section 10 was a permanent provision of the Act, Congress nonetheless chose to reexamine the issue of poll taxes in light of changes in the law since 1965. *See* 121 Cong. Rec. 23742 (1975) (statement of Sen. Scott of Va.). The result of that reexamination was a significant amendment of Section 10.

Specifically, Congress (i) deleted subsection 10(d), which had been enacted to cover the contingency that the Supreme Court might uphold poll taxes in state and local elections; and (ii) amended subsection 10(b) to refer to the Twenty-fourth Amendment and thereby to clarify that Section 10 covered federal as well as state elections. These changes were born in the House Judiciary Committee, when it unanimously passed an amendment "to conform the provisions of the Voting Rights Act dealing with the poll tax . . . with recent court decisions and constitutional amendments." H.R. Rep. No. 196, 94th Cong., 1st Sess. 4 (1975); *see also id.* at 71-72 (supplemental view of Reps. Hutchinson, McClory, Wiggins, Fish, Butler, Cohen, Moorhead, Hyde and Kindness); 121 Cong. Rec. 16255 (statement of Rep. Edwards of Cal.), 16260 (same), 16258 (statement of Rep. Butler), 16260 (same), 16757 (statement of Rep. Wiggins), 23742 (statement of Sen. Scott of Va.) (1975). The House Report explained:

> The amendment of the Committee to Section 10 is intended to conform that section to reflect the ratification of the 24th Amendment and the Supreme Court's decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the latter having been decided after the 1965 enactment of Section 10. The 24th Amendment prohibits the denial or abridgment of the right to vote in Federal elections because of the failure to pay any poll or other tax. In *Harper, supra*, the Court held that it is a denial of the equal protection clause of the 14th Amendment for a state to deny the right to vote in state elections because of the failure to pay a poll tax. Section 10(b) is amended by adding Section 2 of the 24th Amendment to the other enforcement provisions, pursuant to which Congress directs the Attorney General to institute actions against poll tax requirements. Section 10(d) is deleted. That provision provides for the eligibility of voters in covered jurisdictions upon payment of current year poll taxes to either Federal examiners or local election officials. The 24th Amendment to the Constitution and the Supreme Court's decision interpreting the 14th Amendment now clearly prohibit the imposition of poll taxes for all elections.

H.R. Rep. No. 196, 94th Cong., 1st Sess. 36 (1975); *see* S. Rep. No. 295, 94th Cong., 1st Sess. 10, 44, 63, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 776, 811, 818.

The authors of the amendment to Section 10 further explained that only the "[o]bsolete provisions [of Section 10] were deleted." H.R. Rep. No. 196, 94th Cong., 1st Sess. 71 (1975) (supplemental views of sponsors); *see also* 121 Cong. Rec. 24735 (1975) (same).

These changes provide clear evidence that the 94th Congress contemplated a private cause of action for any citizen whose right to vote in a federal election was abridged by a poll tax. Congress deleted subsection 10(d) as "obsolete," *see id.*, but chose to strengthen the rest of Section 10. That decision reflected Congress's awareness that the original justification for subsection 10(d) was no more, as all four states that retained a poll tax as of 1965 had subsequently been forced to abandon it. *See Harper v. Virginia Bd. of Elections, supra*; *United States v. Mississippi*, 11 Race Relations L. Rep. 837 (S.D. Mass. Mar. 31, 1966) (three-judge court); *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court); *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex.) (three-judge court), *aff'd per curiam*, 384 U.S. 155 (1966). Indeed, both the House and Senate Judiciary Committees expressly relied upon this Court's holding in *Harper*—a case originally filed, and appealed, by four private plaintiffs (and later joined by the United States as *amicus curiae* in this Court)—that conditioning the right to vote on the payment of a poll tax violates the Equal Protection Clause of the Fourteenth Amendment. *See* H.R. Rep. No. 196, 94th Cong., 1st Sess. 4, 36 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 10, 44, 63, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 776, 811, 818.

Although Congress rightly recognized that the decisions cited above, which by 1975 had eradicated every poll tax in the United States, made subsection 10(d) "obsolete," Congress nonetheless chose to reenact and broaden the other parts of Section 10. It simply cannot be correct that Section 10—as amended—was merely an instruction to the Attorney General to institute actions against the poll tax "forthwith," because as of 1975 there

were no such taxes to be challenged. The Attorney General had already fought and won that battle. By keeping subsections 10(a), 10(b), and 10(c) in the Voting Rights Act, the 94th Congress could only have intended to provide a statutory basis for challenging poll taxes enacted after 1975, such as the Virginia tax at issue in this case. Thus—whatever the status of the rights protected by Section 10 in 1965—as of 1975, Section 10 stood in the same position as Section 5 of the Act, and the logic of *Allen v. State Board of Elections* therefore applies with full force.

At the same time that Congress expanded the scope of Section 10, it kept intact the references to Section 10 in Sections 11(b), 12(a), 12(c), and 12(d) of the Act. *See* 42 U.S.C. §§ 1973i(b), 1973j(a), 1973j(c), 1973j(d). Those cross-references clearly indicate that Section 10 secured substantive "rights" to individual voters— specifically, the "right of citizens to vote . . . [without] the requirement of the payment of a poll tax as a precondition to voting." 42 U.S.C. § 1973h(a).

Therefore, the text, the legislative history, and the purpose of the 1975 amendments point to only one conclusion: Congress intended Section 10, as amended, to create a private right of action to challenge poll taxes in federal elections.

CONCLUSION

The decision of the three-judge court should be reversed.

Respectfully submitted,

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No. 94-203

In The

Supreme Court of the United States

October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW AND KIMBERLY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal From The United States District Court For The Western District Of Virginia

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether Virginia's Constitution or statutes "grant authority" to political parties to nominate candidates by convention so as to implicate § 5 of the Voting Rights Act.

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BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

The Attorney General for the Commonwealth of Virginia respectfully submits this brief *amicus curiae*, on behalf of the Commonwealth of Virginia and its citizens, and in support of Appellees.

The Appellants and their *amici* purport to examine Virginia law and reach conclusions regarding the relative power and authority of the Commonwealth and its citizens. Appellants' characterization of state law is so flawed as to strike at the very foundation upon which

government in Virginia rests. A question as significant as the relationship between a state government and the citizenry must not be entrusted to the representations of the parties to a cause, each with their own purposes and interests, which are independent of the interests of the citizens of the state whose laws are implicated by their dispute. The interests of the citizens of the Commonwealth must be represented in this action because the legal issues raised thereby put their power and authority as citizens at risk. It is the duty of the Attorney General of Virginia to correct the interpretation of Virginia law offered by the Appellants. In so doing, it is his privilege to stand in defense of the traditional liberties and inherent rights of each and every citizen of the Commonwealth to participate in political activity and to gather together in political associations upon their own terms, with a minimum of interference from their governments. It is their natural and constitutional right to do so; it does not require any permission or grant of authority from the state.

SUMMARY OF ARGUMENT

The position of the Appellants is poised precariously upon the premise that Virginia's election laws *grant authority* to political parties, including the Republican Party of Virginia (hereinafter "RPV"), to select their candidates for public office at conventions.[1] Appellants' Br.,

[1] This supposed grant of authority is also relied upon by Appellants for satisfaction of the two part test which is provided by § 51.7 of the regulations governing application of the

at 11. What the government grants, the government may take away. Thus, Appellants' interpretation of state law is the very antithesis of the principles upon which the government of the Commonwealth was formed and upon which it is daily maintained.

All power in the Commonwealth is vested in and derived from the people. Va. Const. art. I, § 2.[2] The individual citizens of the Commonwealth retain their inherent authority to organize into groups which select from among themselves a candidate to promote for a public office. Va. Const. art. I, §§ 2, 3, 6 and 12.[3] To say that they are granted that authority by the state would be to say that the state has the power to deny them that authority. This is not the law of Virginia. The fundamental rights of all Virginians, to political association, expression and action, are neither obtained nor exercised by the

Voting Rights Act and which attempts to define the activities of political parties that are subject to the Act's preclearance requirements.

[2] "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." Va. Const. art. I, § 2.

[3] The protections and limitations established by article I of the Virginia Constitution are echoed by the Bill of Rights of the U.S. Constitution and the position taken herein on the basis of the former finds equal strength in the latter. However, it is the unique role of the Attorney General of Virginia to guard and defend the rights of Virginians as they are secured by provisions of the Virginia Constitution and as they are reflected in the laws of the Commonwealth. The constitutional protections afforded Virginians by their state constitution pre-date federal constitutional limitations on state action by more than a century.

grace of government. They reside independently of government in each and every citizen and they are expressly acknowledged and accommodated by Virginia's election laws.

Political parties in Virginia are not creatures of state government but voluntary associations of people who band together to advance their common views concerning the conduct of their government. Central to their task is the election of individuals who share their views to public office, an objective that typically leads political parties to choose individuals, who will seek election by the public at large, as representatives of the party and its views. Parties do not undertake these activities as the result of any license or grant of authority from state government. The authority to conduct these activities is an inherent right of the people. Like other exercises of free speech and assembly, the selection of candidates in Virginia may be subject to some limited degree of regulation by the state. However, it nonetheless remains an inherent right, not a matter of authority bestowed by the government.

Virginia's election law establishes procedures whereby political parties, groups and individuals, including "minor" parties, may have access to the ballot so as to place their candidates' names before the electorate. *See* Va. Code Ann. §§ 24.2-508 to -511, -500 to -504. Virginia law also lowers the threshold for inclusion on the general election ballot for the candidates of those groups meeting the statutory definition of "political party"; and it offers such groups access to the public electoral machinery if the group desires to delegate its power to nominate to a state-run primary. *See* Va. Code Ann. §§ 24.2-512 to -558. However, the reasonable functions of that lowered

threshold are (i) to require groups to demonstrate some minimal level of support from the electorate before they are permitted to require the expenditure of public resources through a state-sponsored primary and (ii) to protect the integrity of the political process from frivolous or fraudulent candidates. *Libertarian Party v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985). These provisions of Virginia law, individually or in concert, do not and cannot transform the free exercise of inherent rights of Virginians into acts taken pursuant to a delegation of state authority.

Therefore, neither the RPV nor any other political party or group can be subjected to the preclearance requirements of § 5 of the Voting Rights Act when they conduct a convention to nominate candidates. The Justice Department's regulations do not allow it and the previous decisions of this Court do not support it.

ARGUMENT

Appellants seek to subject the decisions of political parties in Virginia, regarding what method they will employ to select a candidate to represent them in a general election, to the preclearance requirements of § 5 of the 1965 Voting Rights Act. Section 5 itself makes no mention of political parties. 42 U.S.C. § 1973(c) (1988). However, the Justice Department, in reliance on its interpretation of Congressional intent, has explained by regulation when the provisions of the preclearance provisions

of the Act are imposed on political parties. 28 C.F.R. § 51.7 (1993). Its regulations provide that

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5.

28 C.F.R. § 51.7 (1993). Under this regulation, two distinct conditions must be met in order for an activity by a political party to be subject to the preclearance requirement of § 5.[4] First the change must relate to a "public electoral function" of the party. Second, the party must be acting under "authority granted by the state." Among

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[4] A third requirement reflected in the regulation is that there must be a change affecting voting. "Voting" is a carefully defined term that includes "all action necessary to make a vote effective in primary, special or general election. . . . " 42 U.S.C. §1973(c)(1). The definition makes no mention of *convention* votes. This deliberate omission supports the view that Congress did not seek to make political activity subject to preclearance where it does not occur pursuant to a grant of state authority.

Appellants' errors is that they fail to acknowledge these as two separate criteria, but instead treat them as only one: state action. The distinction between the two is illustrated in the example used by the regulation. The example refers to "primary elections at which . . . delegates to party conventions . . . are chosen. . . . " *Id.* It does not refer to any other method for choosing delegates to party conventions, nor does it refer to the actual conventions themselves. Even if a party's decision to nominate its candidate at a party convention were, by some authority, deemed to be a "public electoral function,"[5] it does not necessarily follow that the second prong of the test is satisfied, *i.e.* that the party's authority to hold a convention was granted to it by the state. In arguing that the RPV violated the Voting Rights Act, Appellants and the Solicitor General take the position that the RPV, when it decided to nominate its candidate for the 1994 race for the United States Senate by party convention and when it decided to charge a fee to delegates to that convention, "act[ed] under authority explicitly or implicitly granted by" the state of Virginia. Appellants' Br. at 27; Brief of the United States, at 13. Appellants purport to locate the express delegation of authority which supports their position in §§ 24.2-509 to -511 of the Code of Virginia. Appellants' Br., at 27. This position depends upon a complete misapprehension of the source of political power in Virginia. Appellants also misapply the decisions of this Court in which actions of political parties have been

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[5] Only the most heinous of affronts to constitutional rights have justified to this Court so extreme an intrusion into the activities of political parties as Appellants seek. *See Terry v. Adams*, 345 U.S. 461 (1953).

treated as state action for purposes of applying constitutional restraints.

The Voting Rights Act is not applicable to the facts of this case because the RPV, in deciding how it would select its candidate for the United States Senate, did not act pursuant to a legislative grant of authority from the Commonwealth of Virginia, as required by § 51.7 of the regulations if preclearance requirements are to apply. The Party acted pursuant to the constitutionally guaranteed rights of association, free speech and political action of its members. Under § 51.7, primary elections – events necessarily dependent on state resources – are subject to the preclearance requirements of the Voting Rights Act. Functions which arise from the party's *inherent* power – such as the right to assemble in convention – are not. This distinction follows necessarily from the Court's analysis of the obvious tension that exists between the inherent functions of the political party, which are constitutionally protected, and those which are arguably subject to state regulation in certain carefully prescribed instances. The regulation identifies primaries at which parties select candidates as activities within the reach of the Voting Rights Act. Notably, it does not so identify party conventions.

I. THE AUTHORITY OF THE REPUBLICAN PARTY OF VIRGINIA TO NOMINATE CANDIDATES FOR PUBLIC OFFICE BY WHATEVER METHOD IT SELECTS DOES NOT FIND ITS SOURCE IN STATE LAW BUT IN THE INHERENT RIGHTS OF THE PEOPLE.

"[A]ll power is vested in, and consequently derived from, the people . . . . " Va. Const. art. I, § 2. Virginia's

Constitution is the embodiment of the delegation of authority, by the citizens of the Commonwealth, to their state government. *See Staples v. Gilmer*, 183 Va. 613, 622-25, 33 S.E.2d 49, 53 (1945). The provisions of Virginia's constitution, and the statutes enacted pursuant to the authority granted thereby, can be read only in the context of the reservation of rights set forth by the first article of that document.

Article I of Virginia's constitution explicitly reserves to the citizens of the Commonwealth the right to free elections. Va. Const. art. I, § 6.[6] Inherent in this right is the right of the people to associate together for the purpose of putting forward candidates for inclusion on the general election ballot; *i.e. to nominate candidates.* As significant, article I also explicitly reserves to the people the authority to reform, alter or abolish their government. Va. Const. art. I, § 3.[7] In addition to explicitly reserving

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[6] That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good. Va. Const. art. I, § 6.

[7] That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and, whenever any

certain rights to the citizens of the Commonwealth, Virginia's constitution reminds those who would understand our system of laws which is constructed thereby that all citizens of the Commonwealth have certain inherent rights which they cannot deprive themselves of by delegation, and that the enumeration of certain of those rights in article I is not intended to imply any limitation of them. Va. Const. art. I, § 17.[8] Read together, the foregoing constitutional provisions establish a framework for the operation of a state government that receives its limited power by delegation from the people and which has no power to usurp the inherent rights or authority of its citizens. Nowhere in the Virginia Constitution do the people surrender their right to organize themselves in support of particular political ideas, and to select and support candidates for public office whom they believe will promote those commonly held ideas. In fact, that authority is explicitly protected by the Virginia Constitution's guarantee of free elections and its express prohibition of any law which abridges the right of the people to assemble peaceably or to petition the government for the

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government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Va. Const. art. 1, § 3.

[8] "The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed." Va. Const. art. I, § 17.

redress of grievances. Va. Const. art. I, § 12[9]; *See Mahan v. National Conservative Political Action Comm.*, 227 Va. 330, 152 S.E.2d 829 (1984).

Article II of Virginia's constitution provides for the protection and exercise of the people's right to vote. Section 4 of article II directs Virginia's state legislature to "provide for the nomination of candidates."[10] Va. Const. art. II, § 4. Contrary to Appellants' urging, this constitutional direction does not make nominations by political parties acts pursuant to a delegation of authority. It does not cede to the legislature the inherent power of the people to organize and offer candidates of the organization's choosing for inclusion on a general election ballot. When read in conjunction with the guarantee of free elections, this provision simply requires the government

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[9] That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble and to petition the government for the redress of grievances.

Va. Const. art. I, § 12.

[10] "The General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution." Va. Const. art. II, § 4.

to acknowledge and to facilitate the exercise of that inherent right.[11] It requires the government to provide terms upon which the citizens' exercise of their inherent rights will be recognized and incorporated by the government in its conduct of general elections.[12]

Sections 24.2-509 through 24.2-511 of the Virginia Code, the provisions of Virginia law mistakenly relied upon by Appellants to characterize the RPV as a state actor, merely provide order, method and predictability to the government's exercise of its duty to conduct free elections. They inform citizens of the conditions upon which their candidacies, or the candidates of any organization they may form, will be recognized by the public electoral process. The statutes achieve their purpose with minimum intrusion on the power of the individuals and any political parties they may form. They do not "delegate authority" to nominate candidates for public office. That authority does not reside in the legislature and, therefore, is not the legislature's to grant or deny. Contrary to the Appellants' allegation, Virginia law does not presume to "delegate" or grant authority to political parties, either explicitly or implicitly, to nominate candidates. It does not substantially regulate the performance

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[11] The ordinary meaning of the term "provide," as it was used by the drafters of Virginia's constitution, is to furnish, supply or equip; to take measures with due foresight; to arrange for; or to supply means of support. Webster's Unabridged Dictionary of the English Language 1157 (1st ed. 1989).

[12] Virginia Code sections 24.2-509 to -511, as well as §§ 24.2-500 to -504, §§ 24.2-505 to -507 and §§ 24.2-512 to -538, comprise the legislature's acts pursuant to the constitutional mandate of article II, § 4.

of the nomination function but leaves that power in the private hands of political organizations and their individual members.

The fact that political parties do not nominate their candidates under a grant of state authority is not changed by Va. Code Ann. § 24.2-509(B), as cited by Appellants. Appellants' Br., at 4 and 27. This statute, which allows an incumbent previously nominated by primary to demand a primary when he seeks re-nomination, does not grant authority to the *party*. It permits an incumbent to require something of his party if he chooses and it is a restriction on the First Amendment rights of the citizens who comprise the party. First Amendment analysis provides that the statute can survive strict scrutiny only if it is found to serve a "compelling state interest" and is "narrowly tailored to achieve its objective." *See Tashjian v. Republican Party*, 479 U.S. 208 (1986). Assuming *arguendo* that the statute passes these tests, it is, at best, a reasonable restriction on the inherent right of political parties to select their candidates freely. It does not grant political parties anything.[13]

A political party is generally defined as a body of persons voluntarily associated to promote certain views or principles with respect to government. Political parties have certain inherent functions, among which is the nomination of candidates for election to public office. Any regulation of that power is subject to strict constitutional limitations. *Tashjian*, 479 U.S. at 213 -14. *See Mahan*, 227

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[13] Section 24.2-509(B) of the Code of Virginia has not, at this writing, been put to the test of a constitutional challenge.

Va. 330, 152 S.E.2d 829; 1986-1987 Va. Att'y Gen. Ann. Rep. 204, 205. For certain limited purposes under Virginia's election laws, the term "political party" is given a more narrow and precise definition. Va. Code Ann. § 24.2-101. The use of the term is a limited reference to those organizations, comprised of citizens of the Commonwealth, "which, at either of the two preceding statewide general elections, received at least ten percent of the total vote cast for any statewide office filled in that election" and which have a state central committee and an office of elected state chairman both of which have been continually in existence for at least six months. Va. Code Ann. § 24.2-101. However, lest there be any argument that the statutory definition of the term somehow alters the inherent rights of political parties which meet that definition, Va. Code Ann. § 24.2-508 states that a political party, as defined by statute, retains those powers which are inherent in all political organizations, including the power to nominate candidates:

> Each political party shall have the power to (i) make its own rules and regulations, (ii) call conventions to proclaim a platform, ratify a nomination, or for any other purpose, (iii) provide for the nomination of its candidates, including the nomination of its candidates for office in case of any vacancy, (iv) provide for the nomination and election of its state, county, city, and district committees, and (v) perform all other functions inherent in political party organizations.

Va. Code Ann. § 24.2-508. If, as argued by Appellants, the protection offered by this provision is a *delegation* – rather than an *acknowledgment* – of authority to nominate candidates, then the legislature would not have used the phrase "functions *inherent* in political party organizations" (emphasis added). Moreover, if the statute were a delegation and not an acknowledgement, it would necessarily follow that *only* those organizations which meet the statutory definition of "party" have the power to nominate or to exercise any of the other rights listed in the statute. Such a limitation would violate the rights secured to the people by the Virginia Constitution and would be an anathema to the political process in the Commonwealth.

Pursuant to Virginia's election laws, *all* political parties, whether or not they meet the statutory definition, have the right to nominate candidates. *See Libertarian Party v. Davis*, 766 F.2d 865, 868-69 (4th Cir. 1985) (describing "the indulgent nature of Virginia's ballot access scheme . . . "), *cert. denied*, 475 U.S. 1013 (1986). The difference is in how their nominees come to be listed on the ballot. For parties meeting the statutory definition, ballot access is automatic. Other parties must obtain signatures on petitions for their candidates. The definition of "political party" works to establish a threshold which must be met by any political organization in order for it to have automatic access to the general election ballot and/or to request the state to conduct a primary election to nominate its candidate at public expense.[14]

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[14] Primary elections which make use of the state apparatus, organization and officials, and which are conducted at public expense, as well as being open to all voters (as primaries in Virginia are), may transform the candidate selection process

The notion that a "party" has some implicit public authority to "winnow" the field of potential candidates is at the crux of Appellants' justification for requiring the RPV to comply with the preclearance requirements of section 5 of the Voting Rights Act. Appellants' Br., at 20. However, there is nothing in the election laws of the Commonwealth that allows organizations which meet the statutory definition of "party" to narrow the field of potential candidates for the general election ballot. Virginia's general election ballot is not closed to those who fail to get the nomination they seek, where that nomination takes place at a convention.[15] It is a candidate's choice whether he or she will offer him or herself to Virginia voters at large, without seeking the support of a statutorily defined "party."[16] It is reserved to political parties to determine which of those individuals seeking their endorsement, and the benefit of their organization, they will support, but no political organization in the Commonwealth of Virginia, party or not, has the power

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into state action for purposes of federal regulation. However, the reasoning which supports that transformation does not support, in a similar way, the reach of federal law to activities of political parties, such as conventions, which are not administered by the state pursuant to express statutory authority.

[15] By contrast, the general election ballot is closed to those who fail to win a *primary* nomination. Va. Code Ann. § 24.2-520. This point further exhibits a distinction between state action as represented by the state's conduct of a primary and the lack of state action represented by a party's conduct of a convention.

[16] The independent candidacies of Marshall Coleman, a former Republican candidate for state-wide office, and of former Democratic Governor Douglas Wilder, in the 1994 race for the United States Senate, speak directly to the openness of Virginia's system in this regard.

to limit or narrow the general election field by virtue of holding a convention.

The Solicitor General admits that a political party has the power to determine the political positions it will advocate, its rules, and its day-to-day operations and that it has that power independent of its "state-delegated authority to place a candidate on the ballot." Br. of the United States, at 21. However, he fails to provide any meaningful distinction between the functions he concedes and a party's selection of a candidate at a convention. Indeed, to allege any distinction between a party's right to advocate positions and its right to nominate candidates is to misperceive the fundamental nature of American democracy. It is only through their right to nominate candidates that political parties can transform their ideas into action. A party that could adopt platforms but not nominate candidates would be a mere debating society. Under the Virginia Constitution, both of those rights are guaranteed to the citizens of all political parties. Section 24.2-508 repeats that protection for those parties that meet the statutory definition, so that no one can mistakenly believe that meeting the definition somehow transforms an association of private citizens into a creature of the state.

There is a critical distinction between a nomination that takes place by convention and one that takes place by primary. In a primary, the party uses state resources to make its selection, including the state's voting machines, polling places, officers of election and rules of procedure. The party has no inherent right to these resources. It may use them only because the state has granted them the authority to do so. Thus, for purposes of § 51.7 of the

Justice Department's regulations, party primaries are subject to the preclearance provisions of the Voting Rights Act. On the other hand, no group of citizens need await state permission to hold a convention or to decide among themselves who they will put forward as a candidate for election. All Virginians – indeed, all Americans – have this right, whether they are Republicans, Democrats, Socialist Workers, followers of Ross Perot or members of a local civic league. Because no grant of state authority is involved, the second prong of regulation § 51.7 is not met and preclearance is not required.

When the RPV decided to nominate its candidate for the United States Senate at a state convention, and when it determined that it would require payment of a delegate fee, it exercised the inherent authority of its members as citizens of the Commonwealth. The RPV did not "operat[e] under a grant of authority from the state." Where there is no explicit or implicit grant of authority by the state, the actions of a political party are not within the reach of the preclearance requirement of § 5 of the Voting Rights Act, even pursuant to the broad application given that law by the Justice Department's regulations. Therefore, the decision of the District Court, dismissing Appellants' action, must be affirmed.

II. THE DECISIONS OF THIS COURT DO NOT SUPPORT THE PROPOSITION THAT ACTION TAKEN BY A POLITICAL PARTY PURSUANT TO VA. CODE §§ 24.2-509 TO -511 CONSTITUTES STATE ACTION FOR THE PURPOSE OF APPLICATION OF THE VOTING RIGHTS ACT.

Appellants turn to this Court's early 15th Amendment jurisprudence to bolster their conclusion that Virginia law provides the necessary delegation of authority to render a political party a state actor for purposes of the preclearance requirements of the Voting Rights Act. Appellants' Br., at 11. They quote broad dicta, out of its factual context, from *Terry v. Adams*, 345 U.S. 461 (1963), *Smith v. Allwright*, 321 U.S. 649 (1944), and *United States v. Classic*, 313 U.S. 299 (1941), to persuade this Court that the party nomination activities conducted by "private organizations, like RPV," become state action by virtue of their function of narrowing the field of potential candidates. Appellants' Br., at 20. From that premise they argue that the preclearance provisions of the Voting Rights Act, which were enacted subsequent to the Court's decisions in those cases, were intended to reach decisions regarding conventions conducted by political parties. Appellants' Br., at 20. However, neither the facts nor the state laws which were at issue in *Classic*, *Smith* and *Terry* bear any similarities to the facts presented to the Court in this case. Without any remote resemblance between the facts of those cases and this one, Appellants' attempt to lend the force of 15th Amendment jurisprudence to their position must fail.

The Court's decision in *Classic* stands for the proposition that the Constitution authorizes Congress to regulate

primaries as well as general elections. *Smith*, 321 U.S. at 659. The Court explained in *Smith* that their determination in *Classic*, that the actions of the Democratic Party in Louisiana with regard to the conduct of primary elections were subject to federal regulation, was a conclusion drawn from their finding that the laws of Louisiana set up an electoral process in which the Democratic primary was an integral step in the general election process. *Id.*, at 660. The Court in *Smith* went on to find that the laws of Texas, like the laws of Louisiana, so controlled the activities of political parties that the challenged action by a political party in that state was the equivalent of action by the state. *Id.*, at 663. In both *Classic* and *Smith*, unlike this case, state law required political parties to nominate their candidates by means of a primary. *Classic*, 313 U.S. at 311; *Smith*, 321 U.S. at 662. However, *the determinative fact common to both those cases was that the candidate selection process at issue was found to predetermine the outcome of the general election. Classic*, 313 U.S. at 318; *Smith*, 321 U.S. at 664. The same cannot be said of the public electoral process in Virginia today, where voters enjoy a healthy, vigorous, competitive and open electoral process.[17] In

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[17] This competitiveness is amply demonstrated by the party affiliation of Virginia's major office-holders. Over the past 30 years, Virginia has elected 4 Republican Governors and 4 Democratic ones. The current Governor and Attorney General are Republicans; the Lt. Governor is a Democrat. One U.S. Senator is a Republican; the other is a Democrat. There are 5 Republican Congressmen and 6 Democratic ones, a change from previous years when Republicans held a majority of the state's Congressional seats. In the Virginia House of Delegates, there are 47 Republicans, 52 Democrats and one independent. In the State Senate, there are 18 Republicans and 22 Democrats.

Terry v. Adams, this Court reached beyond the state-required Democratic primary and found state action in the activities of a county political organization which held its own primary to determine who would run in the Democratic primary. *Terry*, at 475. However, the identification of state action in order to subject the Jaybird Party to constitutional limitation was the single element of the decision upon which a majority of the Court could not agree. Four separate opinions were published in *Terry*. Each of three opinions expressed a different view as to the factual premises which allowed the Court to ascribe public authority to private action so that they might subject activities of the Jaybird Party to the 15th Amendment. There can be no doubt that the Court's willingness to do so sprang from the fact that those activities were so fundamentally repugnant to the values embodied by, and the rights protected by, the United States Constitution.

In comparison to the state laws examined in *Classic*, *Smith* and *Terry*, Virginia's minimal procedural regulations governing the public electoral process do not approach the closed and state-controlled, single-party systems which this Court confronted in those cases. There is not, in this case, any activity which, like that in *Terry*, necessitates the Court's intrusion into what otherwise is protected as private political activity. *See Eu v. County Democratic Comm.*, 489 U.S. 214 (1989) (state law ban on primary endorsements by political parties and laws governing composition and governance of parties overturned as in violation of First and Fourteenth Amendments); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (holding unconstitutional a state statute that sought to

limit the body of registered voters which a party by its rules could permit to vote in its primaries); *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981) (upholding a party's right to refuse to seat delegates to its national convention who were selected pursuant to state law but in violation of party rules). Even if the authorities cited by Appellants could be construed to support a finding of "state action" in the RPV's decisions to hold a convention and charge a delegate fee, only the "public electoral function" prong of the two-prong test of § 51.7 of the regulations would be satisfied. Appellants would still have to establish that the party's actions were taken pursuant to a "grant of authority" from the Commonwealth. As explained by Part I of this Brief, this is a hurdle they cannot get over.

Appellants chose not to rely on the Voting Rights Act decisions of this Court as primary support for their position. This is so because, in thirty years, the Court has never held that the preclearance requirements of the Act apply to a political party conducting a convention to nominate a candidate for public office. The Voting Rights Act decisions of this Court, which are cited by *amici* in support of Appellants' position, without exception, extend the requirements of the Act where the actions complained of were taken by public officials executing their public duties. *See, e.g., NAACP v. Election Comm'n*, 470 U.S. 166 (1985) (actions of a county setting an election date deemed subject to the preclearance requirements of § 5 as alterations in voting procedures by state officials); *Board of Educ. v. White*, 439 U.S. 32 (1978) (county school board deemed a political subdivision for purposes of preclearance under the Voting Rights Act and required to

submit personnel policy, regarding leave taken by employees to run for public office, to the Attorney General in compliance with § 5 of the Act).

In District Court cases which have extended the reach of § 5 of the Voting Rights Act to activities of political parties, the courts have done so on the basis of state laws and electoral processes quite different from that which exists in Virginia. *Fortune v. Democratic Committee*, 598 F. Supp. 761 (E.D.N.Y. 1984); *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972). In *Fortune*, action by a Democratic Party committee to change its rules regarding selection of its Executive Committee was subjected to the requirements of § 5. The Party was deemed to perform a "public electoral function" because New York law delegated to the Executive Committee of the Party the power to fill vacancies in nominations and to authorize non-party members to run as Democrats. *Fortune*, 598 F. Supp. at 765. However, these statutes were integrally related to an underlying requirement of New York Election Law § 6-110 that parties nominate their candidates by state-sponsored primary; a requirement that Virginia law does not adopt and that is constitutionally suspect in light of *Tashjian* and *Eu*. In *MacGuire*, the court extended the requirements of § 5 of the Voting Rights Act to a change in party rules which governed the election of delegates to national conventions. However, those delegates were elected by means of a primary. In fact, the court in *MacGuire* specifically distinguished the case where a primary election is involved, from the case where a party selects delegates by convention, and noted, "[T]he Act does not protect one's right to participate in local convention." *MacGuire*, 343 F. Supp. at 121 n.3. There is no precedent

for the application of the provisions of the Voting Rights Act to the activities of a political party in choosing a nominee by convention.

Political parties in Virginia are not creatures of the state, created by statute. The freedoms of association and speech are firmly rooted in the foundations of Virginia government and carefully guarded by its constitution and statutes. They include partisan political activity as they do the decisions of political organizations regarding the selection of candidates for public office. The selection and support of those candidates is a party's most critical function. It is the very essence of political expression or, as the Court stated in *Tashjian*, the "crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 215. The right to nominate candidates for public office at a convention can no more be said to be exercised by the RPV pursuant to a grant of authority from the Commonwealth of Virginia than can a citizen's right to freedom of speech and association be described as being delegated by Congress. All are rights retained by the citizens of the Commonwealth pursuant to the terms of their constitution and are very carefully protected thereby and by the election laws of the Commonwealth. *Id.*

CONCLUSION

Appellants urge this Court to adopt a radical new expansion of the Voting Rights Act, based on a deeply flawed misunderstanding of Virginia law. The people of Virginia have *never* been forced to obtain permission from any government – whether their state government or the Department of Justice – before associating together at political conventions and choosing candidates for public office. There is no reason and no law which supports the imposition of so draconian a requirement now. For the foregoing reasons, the decision of the District Court, to dismiss Appellants' action, must be affirmed.

Respectfully submitted,

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